TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 179.

CHARLES S. LANDRAM AND JOHN A. BROADDUS, EXECUTORS OF CONSTANCE K. VERTNER, DECEASED, AND LILLIE K. VERTNER, APPELLANTS,

vs.

GABRIELLA K. JORDAN.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 10, 1906.

(20,042.)

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SUPREME COURT OF THE UNITED STATES

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No. 540.

CHARLES S. LANDRAM AND JOHN A. BROADDUS, EXECUTORS OF CONSTANCE K. VERTNER, DECEASED, AND LILLIE K. VERTNER, APPELLANTS,

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1 In the Court of Appeals of the District of Columbia.

No. 1476.

CHARLES S. LANDRAM ET AL., Executors, Appellants,
vs.
GABRIELLA K. JORDAN.

Supreme Court of the District of Columbia.

No. 22729. In Equity.

GABRIELLA K. JORDAN, Complainant,
vs.
ELIJAH S. DRAKE, Trustee; LEROY M. TAYLOR, Trustee; CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, and LILLIE K. VERTNER, EDMUND K. VERTNER, and THOMAS K. VERTNER, Infants, Defendants.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above entitled cause, to wit:—

(1) *Bill to Review Decree in Eq.* 21422.

Filed Oct. 29, 1901. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Equity. No. 22729.

GABRIELLA K. JORDAN, Complainant,
vs.
ELIJAH S. DRAKE, Trustee; LEROY M. TAYLOR, Trustee; CONSTANCE K. VERTNER, and LILLIE K. VERTNER, EDMUND K. VERTNER, and THOMAS K. VERTNER, Infants, Defendants.

To the supreme court of the District of Columbia, holding an equity court:

The said complainant exhibits this her bill of complaint against the above named defendants and thereupon respectfully shows to the court as follows:

2 1. That the said complainant is a citizen of the United States and a resident of the State of New York, and she brings this suit in her own right and as one of the devisees of the last will and testament of Thomas Kearney, deceased.

2. That the said defendants, Elijah S. Drake and Leroy M. Taylor are sued as trustees appointed by the said will. That both of them are citizens of the United States, and that the said Elijah S. Drake is, as complainant is informed and believes, a resident at Port Gibson in the State of Mississippi, and that the said Leroy M. Taylor is a resident of the city of Washington in the District of Columbia. The defendants, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner are citizens of the United States and complainant is informed and believes their place of residence is Luray in the State of Virginia, and they are sued in their own right and as devisees under the said last will and testament of Thomas Kearney, deceased.

Complainant avers that the said defendants, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner are infants.

3. That heretofore, to wit, on the 15th day of May, 1900, the said defendant, Elijah S. Drake one of the said trustees as aforesaid, filed and exhibited his bill of complaint in equity in this honorable court holding an equity court, against the said Leroy M. Taylor, the other said trustee, and the said Constance K. Vertner, and the said Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, infants, and this complainant as defendants to said bill, the said cause being designated and numbered 21,422 upon the equity docket No. 48 of said court; a true and correct transcript of the entire record of said cause duly certified to by the clerk of the said court is herewith filed marked Complainant's Exhibit No. 1, and is prayed to be taken and read with this bill as a part hereof and with the same effect as though the said record or the several parts thereof were copied herein when referred to in any paragraph of this bill.

A duly certified copy of the said will of Thomas Kearney deceased, was filed with his bill by the said trustee Elijah S. Drake marked Exhibit "A" in said cause and was prayed by him to be read as a part of his said bill, all of which will fully and at large appear by reference to the duly certified transcript of the record of said cause No. 21422, equity docket No. 48 filed herewith and marked Complainant's Exhibit No. 1.

4. That said Elijah S. Drake, said trustee, set forth in his said bill in said cause No. 21,422 certain provisions of the said will of said testator relating to and disposing of certain real estate and the rents, revenues and profits arising therefrom, situated in the city of Washington, District of Columbia. Amongst other provisions so set forth are the sixth and eighth items of said will which are in the following words and figures: (Sets out at large items 6 and 8 of said will).

3 5. That the said trustee, Elijah S. Drake, in and by the sixth paragraph of his said bill in said cause alleged and averred as follows:

"6th. Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia and your complainant is advised that the said provisions are void because they attempt to create a perpetuity."

6. That the said Elijah S. Drake, said trustee, in and by the third prayer of his said bill prayed as follows:

"3rd. That by a decree of his honorable court the last will and testament of Thomas Kearney deceased be construed so far as the same deals with the real estate within the District of Columbia therein devised."

7. That this complainant, Gabriella K. Jordan, on the 15th day of May, 1900, in her proper person filed in said cause her separate answer to the said bill of the said Elijah S. Drake, trustee, in the words following:

"This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in the said bill of complaint to be true," as by reference to said transcript of the record of said cause will fully and at large appear.

And that on the said 15th day of May, 1900, the said defendant, Constance K. Vertner, filed her separate answer to the bill of complaint of the said Elijah S. Drake trustee in said cause, to the effect following: That she admitted all the matters and things averred in the said bill of complaint of the said Drake, trustee, and that she was advised and so averred that the said will of her father, Thomas Kearney deceased, is void and of no effect to dispose of the real estate situated in the District of Columbia for the reason that the provisions of said will relating to said real estate attempt to create such an estate as is contrary to the law forbidding the creation of perpetuities. That she and her brother Edmund Kearney were the sole heirs at law of the said Thomas Kearney; that Edmund Kearney died on the 4th day of June, 1898, leaving a widow, Mary B. Kearney, and that she the said Constance K. Vertner was his sole heir at law. That the said Edmund Kearney left a last will and testament, a certified copy of which was filed with said answer and prayed to be read as a part thereof, but that she was advised that the said will of Edmund Kearney is not in proper form to pass the title to real estate within the District of Columbia. That she joined in the prayer of the bill of complaint of the said Drake trustee for a decree declaring the proper construction of the said will of Thomas Kearney deceased so far as it relates to real estate in the District of Columbia.

4 And that on the 22nd day of May, 1900, the said court by its decree in said cause No. 21,422 appointed Fred McKee guardian *ad litem* of the infant defendants in said cause to defend said cause on their behalf, and on said last mentioned day said infant defendants by their said guardian filed their answer in the said cause neither admitting nor denying the matters and things averred in said bill but submitting their interests to the protection of the court.

That on the said 23rd day of May, 1900, the said Leroy M. Taylor filed his answer in said cause No. 21,422 in substance and effect set-

ting forth that he had renounced and declined to act as trustee under the said will of Thomas Kearney deceased, and thereby renewed said renunciation and declination.

And that on the day last mentioned the said complainant, Elijah Drake joined issue with defendants in said cause as follows:

"The complainant joins issue with the defendants and will try the above-entitled cause upon the bill and answers filed therein."

And that thereupon and on the same day the said cause was ordered calendared by the complainant Drake for hearing on the bill and answers for the June term, 1900, of the said court, and was calendared by the clerk.

And that at the June term, 1900, of the said court, the said cause No. 21,422 was set down for hearing and was submitted to and heard by the said court on the pleadings filed therein and at said term, to wit: on the 27th day of June, 1900, the said supreme court of the District of Columbia sitting in equity made, pronounced, passed and entered upon the records and minutes of the court a final decree in said cause No. 21,422, signed by the associate justice of the said court then and there presiding and holding said term by which said final decree the court adjudged, ordered and decreed as follows:

"This cause having been calendared was submitted on the pleadings filed therein and duly considered, it is by the court this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that the said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate, and the same descended to his heirs at law.

JOB BARNARD, *Justice.*

8. That no appeal has been taken from said final decree by any of the parties to said cause No. 21,422 and that the complainant, Gabriella K. Jordan, was greatly injured and grieved by the said final decree, and the construction of the said will by the court and the effect whereof has been, and is, to deprive her of her said property devised to her for life of the said sixth item of the said last will and testament of the — Thomas Kearney, deceased.

9. That the said complainant, Gabriella K. Jordan, avers and insists that the said final decree in said cause No. 21,422 is erroneous and ought to be reviewed, reversed and set aside for many errors and imperfections apparent upon the face of said decree and of the record of the proceedings in the said cause, and the said complainant avers that the said decree amongst other things was erroneous as aforesaid in the following particulars:

(1.) In adjudging, ordering and decreeing relief upon the said bill which should have been dismissed by the court *exmero motu.*

(*a.*) Because the said trustee had no right, title or property in the subject matter of said suit cognizable in a court of equity as would authorize him to institute said suit for the purpose of defeating and frustating the purposes of the said devise in favor of the said Gabriella K. Jordan as declared by the testator in the sixth item of said will.

Stricken out and expunged by order of the court* by order dated 5th Nov. 1903.

(*b.*) Because the institution of the said suit by the said trustee under said will was a breach of his said trust and of the confidence reposed in him whose duty it was to defend the title and interest of the *cestui* [que]* *trust*, Gabriella K. Jordan, thereunder and a court of equity cannot lend its aid to the commission of said breach.

(*c.*) Because said court had no jurisdiction upon the merits of said suit, and for that reason said bill should have by said decree been dismissed.

(2.) In adjudging, ordering and decreeing relief upon said bill in the absence of proper and necessary parties to the suit neither the said Edmund Kearney (if living), or if he were dead, his personal representatives having been made a party, nor any proof made that he died without issue him surviving or that the said Constance K. Vertner was his sole heir at law, or that he died intestate.

(3.) In adjudging, ordering and decreeing adversely to the said complainant, Gabriella K. Jordan, that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same attempt to dispose of lands and tenements lying and being within the District of Columbia are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuties and contrary to the statute in such case made and provided and
6 that the provisions of said will of Thomas Kearney, deceased, are deemed and held to be void and of no effect and that as to said lands and premises the said Thomas Kearney died intestate and that the same descended to his heirs at law, whereby the said Gabriella K. Jordan has been deprived of the devise in her favor provided in the sixth item of the said will whereas said devise is a perfectly legal and valid gift being for the life only of the said Gabriella K. Jordan and not in contravention of the law prohibiting perpetuities nor contrary to any statute and that as to said devise the said Thomas Kearney died testate as to said land and tenements situate in the District of Columbia and mentioned in the sixth item of his said will and that the same did not descend to his heirs at law and that the construction of said will and the sixth item thereof by the said decree in the particulars aforesaid was and is wholly erroneous and wrongful.

[Matter enclosed between rules erased in copy.]
[*Word enclosed in brackets erased in copy.]

In consideration whereof and inasmuch as such errors and imperfections appear in the body of the said decree and in the record of the proceedings in said cause, and there is no proof upon which to base any decree deeming and holding that the testamentary disposition in favor of the said complainant, Gabriella K. Jordan, mentioned and declared in the sixth item of the said will of Thomas Kearney, deceased, to be in violation of the law prohibiting the creation of perpetuities, or contrary to the statue in such case made and provided as to the said real estate situated in the District of Columbia; and that there is no proof upon which to base any decree deeming and holding the said provision of said will to be void and of no effect or that the said Thomas Kearney died intestate as to the said land and premises, or that the same descended to his heirs at law as mentioned and set forth in the said final decree,—the complainant hopes that the said decree will be reversed and set aside and no further proceedings be had thereon.

The premises considered your complainant prays as follows:

I. That the said Elijah S. Drake, trustee, Leroy M. Taylor, trustee, Constance K. Vertner and the said infants Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner may be made parties defendant to this bill, and that the United States writ of subpœna may issue to them requiring them and each of them to appear and answer the exigencies of this bill answers under oath being hereby expressly waived.

II. That a guardian *ad litem* be appointed for the infant defendants Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner to defend this suit in their behalf.

III. That for the reasons and errors and under the circumstances aforesaid, the said final decree may be reviewed and set aside, and no further proceedings be had thereon and that the said complainant Gabriella K. Jordan be permitted to remain in the undisturbed enjoyment of the rents and revenues derived from the real estate situate in the District of Columbia as provided in the sixth item of the said will.

7 IV. And the complainant prays for general relief in the premises.

GABRIELLA KEARNEY JORDAN.

EDMUND BURKE,
Sol. for Complainants.

(Sworn to by complainant 8th day of October, 1901.)

(2) COMPLAINANT'S EXHIBIT No. 1.

Filed October 29, 1901.

Bill.

Filed May 15, 1900.

In the Supreme Court of the District of Columbia.

No. 21422, Equity Docket 48.

ELIJAH S. DRAKE, Trustee, Complainant,
vs.
LEROY M. TAYLOR, Trustee; CONSTANCE K. VERTNER, LILLIE K. VERTNER, EDMUND K. VERTNER, THOMAS K. VERTNER, GABRIELLA K. JORDAN, Defendants.

To the supreme court of the District of Columbia, holding a special term as an equity court:

This complainant respectfully represents:

1st. That he is a citizen of the United States resident at Port Gibson in the State of Mississippi and that he brings this suit as acting trustee under the last will and testament of Thomas Kearney, deceased.

2nd. The defendants are citizens of the United States. The defendant Leroy M. Taylor is a resident of the District of Columbia and is sued as trustee under the last will and testament of Thomas Kearney, deceased. The defendants Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, and Thomas K. Vertner are residents of Luray in the State of Virginia and are sued as devisees under the last will and testament of Thomas Kearney, deceased. The defendants Lillie K. Vertner, Edmund K. Vertner, and Thomas K. Vertner are infants. The defendant Gabriella K. Jordan is a resident of New York in the State of New York and is sued as a devisee under the last will and testament of Thomas Kearney, deceased.

3d. That Thomas Kearney, late of San Antonio in the State of Texas, by his last will and testament dated June 4, 1896, which said will has been duly admitted to probate in Webb county, Texas, a copy recorded in the office of the register of wills of the
8 District of Columbia in Will Book 43 at page 251 *et sequitur* and a certified copy filed herewith, marked Exhibit A, and prayed to be read as a part of this bill, devised to this complainant and the defendant Leroy M. Taylor, real and personal property situate in the District of Columbia and the State of Virginia, in said Exhibit A more particularly described in and upon certain trusts therein set forth and declared.

4th. The defendant Leroy M. Taylor has declined the trusts reposed in him by said last will and testament of Thomas Kearney,

deceased, and your complainant has from the date of said declination acted as sole trustee under said will.

5th. The provisions of the said will of Thomas Kearney that relate to the real estate within the District of Columbia are as follows: (Sets out at large items 5, 6, 7, 8, 15, 17, 18, 19, 20 and 21 of said will.)

* * * * * * *

6th. Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia and your complainant is advised that the said provisions are void because they attempt to create a perpetuity.

The premises considered your complainant prays:

1. That the United States writ of subpœna issue to the defendants requiring them and each of them to appear and answer the exigencies of this bill, answer under oath being hereby expressly waived.

2. That a guardian *ad litem* be appointed for the infant defendants Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, to defend this suit in their behalf.

3. That — a decree of this honorable court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised.

4. That he shall have such other and further relief as the nature of the case shall require.

The defendants to this bill are:

Leroy M. Taylor, trustee, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, Thomas K. Vertner and Gabriella K. Jordan.

THOMAS P. WOODARD,
Solicitor for Complainant.

(Sworn to by complainant 10th. day of April, 1900.)

9 COMPLAINANT'S EXHIBIT A.

Filed May 15, 1900.

STATE OF TEXAS, *County of Webb.*

In the name of God, amen.

I, Thomas Kearney, of San Antonio, Bexar county, Texas, being of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all wills and testaments heretofore made by me.

Item 1. As I owe no debts it is my will that all expenses of my last sickness and funeral expenses be promptly paid by my executors hereinafter named.

Item 2. I own in the State of Virginia the following property viz., the house and lot in the town of Luray, now occupied as a residence by my daughter, Constance K. Vertner.

Item 3. I now own the following property situated in the city of

Washington, D. C., viz.: A lot of ground fronting (150) one hundred and fifty feet, ten inches on "F" street, N. W., and running back along Twentieth street ninety-six feet and four inches, bought by me from Edward Temple and others, trustees of the Bank of Washington. Upon this property I have built eight three story and basement dwelling houses, being numbers 2000, 2002, 2004, 2006, 2008, 2010, 2012, and 2014, all fronting on F street, N. W., and all being situate lots numbers (12 and 13) twelve and thirteen, square (104) one hundred and four of said city; leaving a vacant lot on said square and in rear of said eight houses, which vacant lot fronts about (18) eighteen feet on Twentieth street, and runs back one hundred and fifty feet, ten inches. This vacant lot is also my property. I also own in said city of Washington two lots bought by me from Alfred Stidham and wife; said lots being known as lots number six hundred and eleven, "M" street and six hundred and thirteen, "M" street, N. W. (Signed) Thomas Kearney.

Item 4. I now own the following property in the State of Texas, viz.: (*a*) My ranch lands situated in Webb county, Texas, consisting of 68888 acres of land out of the Balconcitas and Palafox tracts of what is known as Joaquin Galin grant, and for a more specific description of same reference is hereby made to the records of my deeds in the deed records in Webb county; my said lands being known as the "Galvan ranch;" the same being all under fence, but in two separate pastures, which are divided by a road leading from Laredo to Eagle Pass. (*b*) Also house No. 215 Obraja street, and the lots appertaining thereto in the city of San Antonio, Texas, the same being the same property heretofore conveyed by me to william Campbell, an insurance man in said city, by deed of trust of date of August 19th, 1892, in trust for the benefit of Mrs. Lottie Richie during her lifetime.

Item 5. Having full faith in the integrity and business capacity of Dr. Leroy M. Taylor of Washington, D. C., and E. S. Drake of Port Gibson Mississippi, I hereby appoint them and their successors, as hereinafter provided, trustees for the purpose of mananging all the real property in item- 2 and 3 of this will, from and after my death, continuously until the year 1928, subject, however, to the conditions and limitations hereinafter imposed, and devise to them, the said Dr. Leroy M. Taylor of Washington, D. C., and E. S. Drake of Port Gibson, Miss., and their successors, all and singular, the property mentioned in item- 2 and 3 hereof, in trust for the uses and purposes and under the conditions hereinafter mentioned. Said trust to be continued in them and their successors until the first day of January, 1928; said trustees and their successors to have full, free and absolute possession and control of the same until the date last above mentioned, with full power and authority to let and lease the same for said period, and to collect all rents and revenues accruing therefrom, with full power and authority to take all necessary steps either in or out of court to collect said rents and revenues, and to protect and preserve said property; provided that the house and lot in Luray, Virginia, mentioned in item (2) two hereof, shall not without the consent of my said daughter, Constance K. Vertner, be rented during

the lifetime of my said daughter; it being my desire that during the term of her natural life my said daughter shall have the use of said house and premises as a home, and free from any and all charges in the form of rent or otherwise. I desire that said trustees shall out of the rents and revenues derived from the Washington, D. C. property, or from funds coming into their hands under any of the provisions of this will, pay all taxes, insurance and costs of repairs on such premises, as long as my said daughter shall occupy same as a home; and in addition thereto, they, the said trustees, shall out of said rents and revenues, or out of said other funds last above mentioned, pay to my said daughter, Constance K. Vertner, during the term of her natural life the sum of ninety dollars per month, the same to be paid monthly. For the purpose of providing a sum sufficient to make said monthly payments regularly my said trustees are hereby authorized and instructed to, of the

at all times, out of any v moneys or funds, mentioned in this paragraph, take and keep on deposit in some secure bank, at least the sum of one thousand dollars. The object of so keeping said sum of one thousand dollars on deposit is to make sure of their being able to make said monthly payments regularly

* (Signed) Thomas Kearney.

*

and without fail; provided, however, that in case my said daughter shall at any time desire to change her residence, the said trustees are hereby authorized and instructed to sell

11 said premises in Luray, Virginia, and to re-invest the proceeds in such other property, for a home for my said daughter, as she may designate; and for this purpose they may appropriate the additional sum of one thousand dollars from any money in their hands, not otherwise appropriated by the terms of this will; said property when so purchased to be held under all the stipulations and limitations as are herein provided regarding the said premises in Luray, Virginia, provided, that upon the death of my said daughter the title to said premises at Luray, Virginia, or the property for which same may have been exchanged as above provided, shall be and is hereby vested in my said Vertner grandchildren equally.

Item 6. I hereby authorize and direct that my said trustees shall during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 "M" street, N. W., Washington, D. C., but in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said sum of forty dollars for each and every month; it being my desire that she shall have a regular income of at least forty dollars per month, and that the same be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof.

Item 7. It is my desire and my trustees are hereby authorized

and instructed to let, lease and rent all the real property described in item 3 hereof, and out of the income derived therefrom, except
No.
that derived from the house known as v 611 M street, N. W.," which shall be paid to my niece as provided in item 6 hereof, to pay (*a*) all taxes assessed against the same, (*b*) the costs of all necessary repairs thereto, (*c*) all costs of insurance, and (*d*) the sum of ninety dollars monthly to my daughter, Constance K. Vertner, as provided in item 5 hereof; the residue, or a sufficient amount thereof, after making the payment of the said ninety dollars monthly, shall be applied for the support, education and maintenance of my beloved grandchildren, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, they being the children of my said daughter, Constance K. Vertner; it being my desire and intention, by the provisions of this will, to provide for the support and education of my said grand-
said
children so that their v mother shall not be taxed for any portion thereof, not even for their clothing.

This item is subject, however, to the provision that upon the said
full
Lillie K. Vertner attaining the v age of nineteen years, the fee simple title to said vacant lot on Twentieth street, as described in item 3 hereof, shall be, and is hereby vested in her, and free from any
12 control or interference by said trustees, and provided further that if I shall during my lifetime improve said vacant lot, then in that event the fee simple title to said vacant lot shall not vest in my said granddaughter, Lillie K. Vertner, until the first day of January, 1928, but upon her arrival at the age of nineteen years, the net rents and revenues derived by said trustees from said lot shall be paid over to said Lillie K. Vertner, to be used by (Signed) Thomas Kearney) her as her own individual property.

Item 8. It is my desire and my said trustees are hereby authorized and instructed that, upon the death of my said niece, Gabriella
No.
K. Jordan, the fee simple title to the house and lot, v 611 M street, N. W., Washington, D. C., shall be and is hereby vested in my grand son, Thomas K. Vertner, provided, that should my said niece die before the 1st day of January, 1928, then in that event, said Thomas K. Vertner shall only receive the net rents and revenues derived by my trustees therefrom, and provided further that, should my said niece, die before my said grand son shall have attained the age of twenty-two years, then, from the date of the death of my niece, until the said Thomas K. Vertner shall have arrived at the age of
derived
twenty-two years the rents and revenues v from said lot shall be disposed of in the same manner as provided in item 7 hereof in regard to the rents and revenues derived from other property mentioned therein, except the vacant lot on Twentieth street, N. W.

It is my desire, and my trustees and their successors in trust are hereby authorized and instructed to open and keep open a private passageway from the public alley to the rear of the house and

lot known as No. 613 M street, and the alley in the rear of said eight houses on F street, N. W., is also to be kept open perpetually, and my said trustees are hereby authorized and instructed to keep the same open; said alley is (3) three feet wide, opens into Twentieth street and runs far enough back to give a rear outlet to each of said houses on F street, N. W., and lies between said eight houses and the vacant lot in the rear thereof which fronts on Twentieth street and runs along the outside of the rear fence to said F street house.

Item 9. On the thirtieth day of May, 1890, I entered into a written contract of co-partnership with one Asher Richardson, for the conducting of a stock ranch business on and in connection with my said ranch lands described in item 4 of this will, and reference is hereby made to the said written contract and the record thereof in the records of said county of Webb, for the terms and conditions thereof and, as there has been an extension of the same when said contract is to expire, which said extension is also in writing, reference is also hereby made to the same and the records thereof for the terms and conditions of the same. It is my desire that my executors hereinafter named shall, and they are hereby authorized and
13 instructed to in all things carry out my part of said contract with said Richardson, and after the expiration of said contract by limitation as to time or otherwise, my executors are hereby authorized and instructed to partition with said Asher Richardson all
all the property
the property v belong*ing* to said co-partnership, the same being all the personal property belonging thereto; and after such partition to sell my part thereof, either at public or private sale, after giving due notice thereof, as my said executors think for
best
the v interest of my estate; all sales thereof under one thousand dollars to be for cash, and all sales for larger amounts to be paid in not less than one third in cash, and the balance on either six or twelve months time, or divided into two payments, one payable at six and the other at twelve months from date of
or all for cash
sale, v as my said executors shall deem best, all deferred payments to be fully secured and to bear interest at the rate of ten per cent. per annum from day of sale. If in the opinion of my executors my said interest in said co-partnership property can be disposed of to a better advantage without a partition

*

then they may sell my undivided interest in such co-partnership property for cash or upon the same terms as above stated, or, if in the opinion of my executors it shall be advisable to ship said live stock or any part thereof out of the State of Texas for sale, then they are hereby authorized to so ship and to sell the same. The pro-
my
ceeds of such sale to be by v said executors disposed of as follows: 1. Set aside the amount necessary to provide*d* for the monthly allowance to Mary Cox, as provided for in item 12 hereof. 2. To pay the legacy of eight hundred dollars to my step granddaughter,

(Signed) Thomas Kearney.

Jennie R. Chamberlain, as provided for in item 11 hereof; and the balance to be disposed of as follows: viz: one-fifth (1/5) part thereof shall by my executors be paid over to my son, Edmund Kearney, if
then
living, but if not then living v to his legitimate child or children if any he leaves surviving him; but if he shall not leave any such child or children surviving him, then his said one-fifth part shall, by my executors be paid to my said trustees for the use and benefit of my said three Vertner grand children in equal portions; subject, however, to the conditions and limitations hereinafter expressed; one-fifth (1/5) to my trustees, the same to be by them held for the use of my said daughter, Constance K. Vertner, and paid over to her in yearly installments of one-fourth part thereof per year for four years; the other three-fifths shall by my said executors be paid over to my said trustees for the use and benefit of my said three Vertner grand children, subject to the conditions and limitations hereinafter expressed.

to be

Item 10. My executors hereinafter v named are hereby
14 instructed to sell my said ranch lands described in subdivision A of item 4 of this will, provided said sale shall not take place until after the termination of my said contract with said Asher Richardson, as mentioned in item 9 of this will. It is my desire and my executors are hereby instructed to sell said ranch
to the to
lands at private sale and on such terms as v price as v them may seem best, and they are hereby fully authorized and instructed to execute and deliver proper deed or deeds of conveyance of same to the purchaser or purchasers thereof; and they are further authorized to sell said ranch lands either in one tract or body, or in two separate tracts. If sold in two separate tracts they shall make the road leading from Laredo to Eagle Pass the dividing line between said two tracts. If sold in one body or tract the purchaser or purchasers thereof shall be required to pay not less than one-third of the purchase price in cash upon the execution and delivery of the deed or deeds
and
thereof; all deferred payments of purchase price, whenever v however sold, shall be secured by a vendors' lien on the premises sold, and shall be payable at such times and bear such rate of
to be
interest as shall to my executors appear v for the best interest of the legatees who are to receive the proceeds of said sale; provided that said ranch lands shall not be sold until my youngest grandson, viz., Thomas K. Vertner, shall have arrived at the age of twenty-two years, unless my said executors shall, upon the
at least
sale of the same, be able to realize v the sum of $2.50 per acre therefor. The proceeds of the sale or sales of my said ranch lands shall be collected by my said executors hereinafter named, and by them paid and disposed of as follows; viz.: The one-
*
fifth part thereof shall be immediately paid over to my said son,

* (Signed) Thomas Kearney.

Edmund Kearney, if living, but in case, he shall be dead at the time the same or any part thereof is collected and shall leave surviving him a legitimate child or children, then the part that should have gone to my said son shall by my said executors be paid over to such surviving child or children, provided that if my said son shall die without leaving surviving child or children and before he said
shall have received v one-fifth part of the proceeds arising from the sale of said ranch lands, or any portion of said one-fifth part, then, in that event said portion remaining unpaid to him shall by my executors be paid over to my trustees for the use and benefit of my said three Vertner grand children, subject to the conditions and limitations hereinafter expressed. (2) Another one-fifth part thereof shall by my executors be paid over to said trustees or their successors in trust, who shall, if my daughter Constance K.
15 Vertner be then living, immediately pay the same over to her, without any limitation or condition whatever; provided that if my said daughter shall have died before said one-fifth part shall said
be received by her, as aforesaid, the same shall by my v trustees be held for the use and benefit of my said three Vertner grand children under the conditions and limitations hereinafter prescribed; (3) The other three-fifths (3/5) part of the proceeds arising from the sale of said ranch lands shall be by my said executors paid over to my said trustees for the use and benefit of my said three Vertner grandchildren, under the conditions and limitations hereinafter expressed; until such sale of my ranch lands my executors are hereby authorized and instructed to rent the same, either all together, or in two separate tracts, and if in two separate tracts, then, the same to be divided by said Laredo and Eagle Pass road, and on such terms as to them may seem for the best interest of my legatees herein. If rented for a term of years the same to be in writing and including the clause permitting my said executors to terminate said term in case of sale by giving six months notice of their determination so to do. The proceeds arising from the renting of said ranch lands shall be disposed of by my said executors to the same persons and in the same manner as is above provided for the disposition of the proceeds of the sale of said lands.

Item 11. I hereby give and bequeath to my said step-grand daughter, Jennie R. Chamberlain, wife of Norman Chamberlain of Natchez, Mississippi, the sum of eight hundred dollars ($800), the same to be paid by said executors to her out of any available cash

that I may have in bank in the State of Texas or from a sale of my interest in the personal property on my said Galvan ranch in Webb county, Texas; provided, that in case the said Jennie R. Chamberlain shall die before I do, then this legacy to her shall be null and void.

Item 12. It is my desire, and my executors are hereby instructed to appropriate from and out of any moneys which may come into their hands from any money which I may leave in any bank or banks in the State of Texas from the sale or rent of any property situated in said State of Texas as in this will provided sufficient sums to provide for the payment (1) of the sum if eight hundred (800) dollars to Jennie R. Chamberlain, as is provided in the foregoing item 11 hereof; v such sum as will, when placed at interest, be sufficient to provide an income from the interest to make a fund of eight (8) dollars per month,

(Signed) Thomas Kearney.

to be paid monthly to my old colored servant, Mary Cox, now in San Antonio, Texas, such monthly payments to be kept up so long as she may live. I suggest said monthly payments to be delivered to Mr. John Newton, of the firm of Newton and Weller of San Antonio, or his wife, who are friends of said Mary Cox, and who, I feel sure, will pay same over to said Mary, with such advice regarding its expenditure as will be for the material benefit of said old servant. This part, however, is only intended as a suggestion. For the purpose of providing such an income my executors are hereby authorized and instructed to appropriate the sum of six hundred (600) dollars out of any money coming into their hands as aforesaid, out of which they shall make said monthly payments provided that this last clause is only intended to provide for such monthly allowance until such time as said other sum may be placed at interest, and said allowance can be derived therefrom.

Item 13. I have, by deed of trust dated San Antonio, Texas, August 19, 1892, conveyed to William Campbell, an insurance agent, residing in San Antonio, Texas, v as trustee for the benefit of Mrs. Lottie Richie, the rents and profits of my house No. 215 Obraja street, and the lots appertaining thereto in the city of San Antonio, Texas; the said rents and profits to be paid over to her, the said Mrs. Lottie Richie, by said trustee monthly as collected during the full lifetime of said Mrs. Lottie Richie, and at her death said trustee is to at once convey said house and lots to my son, Edmund Kearney in fee simple, or if said Campbell is then dead, then the conveyance to my son is to be made by his successor, and in case both he and his successor shall die, without making said conveyance to my son, then the title to said house and lot- shall be vested in my son by virtue hereof as soon as Mrs. Lottie Richie dies. It is also provided in said deed of trust that in the event of the death of the trustee before the decease of Mrs. Lottie Richie, or in the event that he should be in any cause unable to act as such trustee, then said beneficiary is

authorized to select some friend to act as such trustee, and petition the district court of Bexar county, Texas, to appoint the party selected as trustee. This deed of trust, although duly executed, has never been recorded by the trustee, William Campbell, and may become lost or destroyed, and this provision of my will in regard thereto is intended to confirm said deed of trust; but said [deed][* of trust is not to take effect until after my death, and the true intent of the same and of this item of my will is to give the use of the rents of said property after my death to said Mrs. Lottie Richie during her natural life, if she survives me, with a remainder in fee after her death to my son, Edmund Kearney.,

17 Item 14. Having full faith in the integrity and business ability of Daniel Milmo and J. O. Nicholson of nominate and Laredo, Webb county, Texas, I hereby v appoint them and each of them, as executors of all the provisions of this will which apply to my estate in the State of Texas. I desire and that instruct v no security be required of them or either of them. I desire and direct that no other action be had in the county or probate courts of Texas in relation to the settlement of my estate in the State of Texas, than the probating and recording of this my last will and testament and return of an inventory and appraisement of the property belonging to my estate that is situated in the State of Texas, together with a list of claims against my estate. It is my desire, and I hereby direct that in case of the death of either one of my executors, or in case of the inability, failure or refusal of either one of them to act as such executor, then the survivor, in case of the death of one, or the one acting in case of the inability, failure or refusal of the other one to act is hereby vested with all the rights, powers and authority which under any provision of this will is conferred upon both of said executors.

(Signed) Thomas Kearney.

Item 15. Whenever the word "trustees" is used in this will the same shall be construed to refer to the said Leroy M. Taylor and E. S. Drake and their or either of their successors in trust, as hereinafter provided, and wherever the word "executors" is used in this will, the same shall be construed to refer to the said Daniel Milmo and J. O. Nicholson, or the survivor of them, or the one acting as trustee in case of the inability, failure or refusal of either one to act as such executor. It being my desire and intention to confine the duties, authorities and powers of my said trustees to the property situate in the State of Virginia and Washington, D. C., and to the remaining proceeds of that portion of my estate situated in the State of Texas, which under the provisions of this will, are by my said executors to be paid over to the said trustees; and that the duties, powers, and v authority and powers of my said executors shall only extend to and over that portion of my estate situated in the State of Texas.

[*Erased with pencil in copy.]

Item 16. If I shall leave in bank or banks in the State of Texas at the time of my decease any money, then the same is hereby given to my executors in trust for the following purposes, viz.: (1) to pay all costs of my last sickness and funeral expenses, (2) to pay all expenses of the probating, recording of this will, together with the costs of making and returning and recording an inventory and appraisement of all my property in the State of Texas, (3) provide for the payment of the monthly allowance to Mary Cox, and the payment of the legacy to Jennie R. Chamberlain. The residue of such money so left in bank or banks, if any, shall by my executors
18 be paid over to my said trustees, and by them placed in funds, out of which they, the said trustees, are to make the payment of ninety dollars monthly to my daughter, Constance, and to provide for the payment for the support, education and maintenance of my said three Vertner grand children.

Item 17. In case of the destruction of any of the improvements of the Washington, D. C. property described in item (3) three hereof by fire, the insurance money received thereon is to be by my trustees applied to the rebuilding of the improvements so destroyed. And if said insurance money is not sufficient in amount to rebuild the same, then there shall in addition to said insurance the money be appropriated from v money received from rents of balance of said property, or from any money on hand which may have accumulated from such rents, or from any other source, and which may not be necessary for the support, and maintenance of my daughter, Constance, and the support, maintenance and education of my said three grand children, as hereinbefore provided, a sufficient amount to rebuild said destroyed improvements.

Item 18. Having full faith in the honesty and integrity of the the said Leroy M. Taylor and v said E. S. Drake, as aforeit is my desire said v that they act as trustees as is provided in this my last will and testament, and that as such trustees to carry out all and the provisions of the same as is herein provided; v I hereby direct that they nor either of them shall be required to give any

(Signed) Thomas Kearney.

bond as such trustees, and it is my desire that the probate court of the District of Columbia nor of any other State shall require any bond of my said trustees, and that such courts take no further action in regard to my said estate or in regard to my said trustees than to admit this my last will and testament to probate and the receiving of an inventory and appraisement of the property belonging to my estate, and recording the same, and in the case of the death of either of my said trustees then the survivor of them shall have, and is hereby vested with all the rights, privileges, authority and power, including the exemption v giving bond, as is from

hereby conferred upon both of them, and this applies to the survivor one at the time of my death. In case either v of them should die before I do, or in case either of my said trustees shall die before the trust and duties herein conferred upon them shall have been fully performed and discharged, or in case either one of them shall fail, refuse or become from any cause unable to act as such trustee before the said trust shall have been performed as aforesaid, then it is my desire that the surviving trustee in case of the death of one of them, or the acting trustees in case either one shall fail, refuse or 19 become unable to act as such trustee, then in such event and in order to guard against the possible contingency of their coming a time when there will not be any trustee to carry out the said trust and duties, I direct that the said surviving or acting trustee together and the judge of the probate court of the District of Columbia shall v and jointly appoint some one of the Incorporated Trust Company of the the said District of Columbia, which by the laws and v terms of its charter may be authorized to accept and perform such trusts as are herein the provided for, to act as v successor in trust of said surviving or acting trustee, and in case of the appointment of any such company as such trustee, then all the rights, powers and duties herein conferred on the trustees herein named are hereby conferred on said company; provided that so any such company which may be v appointed shall not enter upon the authorities performance of said trust powers and v nor have any authority as or acting such trustee during the lifetime of such surviving v trustee, provided further, however, that if from any cause, such surviving or acting to perform trustee shall before his death become unable or incapacitated v the duties herein conferred on him as trustee, then said trust company may and is hereby fully empowered and instructed to take charge of the trust property herein conveyed to my said trustees, and my to do and perform all the powers herein conferred upon v said trustees. The appointment of said company as successor in trust shall be upon the petition of said surviving or acting trustee to said probate court, provided that should both of my said trustees die or fail or refuse or become unable to perform the duties herein conferred upon them before the appointment of any such company as said successor in trust, then, in such event the petition to said probate court shall be made by said executor or the survivor or the one acting as such executor as the case may be.

Item 19. It is my desire and I hereby direct that any property, real, personal or mixed v situated in the State of Virginia of which I may die the owner, either legally or equitably and not especially mentioned in this will, I hereby give, devise and bequeath to my said daughter, Constance K. Vertner Any other such property situated in the city of Washington, D. C. and not disposed of by any of the provisions of this will is hereby devised to my said trustees for the use and benefit of my said daughter and her said three children, provided that if same shall consist of money the same shall be held by said trustees as a common fund, which in case the rents and revenues derived from the Washington, D. C. property are not sufficient after paying the taxes, costs of insurance and repairs, including the taxes, costs of insurance and repairs on the house at Luray, Virginia, to provide for the payment of (90) ninety dollars per month to my daughter, Constance K. Vertner, as hereinbefore provided, and for the support, education and maintenance of my said three Vertner grand children, as hereinbefore provided, may be drawn on for any or all said purposes. If the same shall consist of personal property other than money the same shall by my trustees be converted into money and the said money shall be used in the same way as the fund last above mentioned. If same shall consist of real estate, it shall be held until the year 1928, under the same conditions and limitations as the real estate hereinbefore devised to the use of my said three Vertner grandchildren, which they shall not come into v possession and control of until said year 1928, as hereinafter provided.

(Signed) Thomas Kearney.

Item 20. It is my desire and my trustees are hereby instructed to keep all the houses herein entrusted to them insured and in repair; to keep all taxes due or to become due thereon paid, and in case of the destruction or injury of them or any of them, to rebuild or repair them in accordance with the instructions in item 17 hereof.

Item 21. For fear that there may be some difficulty in construing the different provisions of this [will],* relating to the moneys which may come into the hands of the trustees herein named, I desire to say that it is my intention that all the moneys arising from the rents of the Washington, D. C. property, except that which is to go to Gabriella K. Jordon, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Virginia; (2) of (90) ninety dollars per month to my said daughter, Constance K. Vertner during her natural life; (3) for the support, education and maintenance of my said three Vertner grandchildren until Lillie K. Vertner shall have arrived at the age of nineteen years, and until Edmund K. and Thomas K. shall have arrived at the age of twenty-two years re-

[*Word enclosed in brackets erased in copy.]

be
spectively. To this fund is to v added any money that I may leave in bank in Washington, D. C.; also the parts and portions which my said three grand children are to receive from my estate in the State of Texas, as hereinbefore provided, which said parts and portions are to be held together with the fund hereinbefore in this item mentioned until Thomas K. Vertner, the youngest of my said grand children, shall have arrived at the
my
age of twenty-two years, provided that when v said grand daughter, Lillie K. Vertner, shall arrive at the age of nineteen years she shall have from said fund a monthly allowance of (50) fifty dollars per month, in addition to the cost of her support and maintenance until said Thomas K. Vertner shall have arrived at the said age of twenty-two, when there shall be

* * * (Signed) Thomas Kearney.

a division made between my said three grand children
21 of all money remaining from my estate in Texas which, under the terms of this will, is to be paid to the trustees for
the
the use and benefit of my said three grand children; they, v said grand children to have the same delivered over to them to share and share alike; and in addition thereto they shall receive the net rents arising from the respective houses and lots hereinafter devised to
said
them respectively, provided that said rents nor their v portion from my said estate in Texas shall be paid over to them during the life-
said
time of their v said mother, Constance K. Vertner, unless there shall be a fund on hand after having so diverted said rents and revenues and the said portions derived from my estate in Texas, sufficient to provide for the payment of the said (90) ninety dollars per month to my said daughter, Constance K. Vertner; but if such provision can be made for the payment of said monthly allowance to my said daughter out of a part only of said funds last above mentioned, then my trustees are instructed to make such provision and to pay balance of said funds over to my said three grandchildren, as hereinbefore in this item provided. On the first day of January, 1928, the title and ownership of the Washington, D. C., property not hereinbefore disposed of, shall be and is hereby vested as follows; viz.: In Lillie K. Vertner the said lot and improvements thereon
six hundred and thirteen,
known as No. (613) v "M" street, N. W.; also houses and lots known as No. (2000) two thousand, (2002) two thousand and two, on F street, N. W.; in Edmund K. Vertner the said houses and lots known as (2010) two thousand and ten, (2012) two thousand and twelve and (2014) two thousand and fourteen on said F street,

the said
N. W.; in Thomas K. Vertner v houses and lots known as (2004) two thousand and four, (2006) two thousand and six, and (2008) two thousand and eight on said F street, N. W.; provided that if my said daughter, Constance K. Vertner shall be living on the first day of January, 1928, then in such event said titles shall not vest in my said grandchildren on said day, and not until the death of their said mother, but upon her death, privided she does not die
said
until after the first day of January, 1928, said title shall immediately vest as above provided in this item. None of the provisions of this will shall be construed so as to prevent said trustees from placing any surplus funds which may remain in their pos-
22 session, after having provided for the payments of the monthly legacies in this will mentioned, in a condition to earn an income in the nature of interest, provided that
any
such surplus must not be invested in v railroad stocks or bonds or other like corporate securities. If the same shall be invested in bonds of any kind, then such bond shall be national, State or municipal. If loaned at interest on real estate security,
such
then v security shall consist of improved business property of value at least double the amount of money loaned thereon, provided, however, that such funds may at the discretion of the trustees be kept in bank on time deposit bearing interest.

Item 22. I direct that my executors be, and they are hereby authorized to deduct from all moneys passing through their

* * (Signed) Thomas Kearney.

hands the usual compensation allowed by the laws of the State of Texas to executors and administrators. I also authorize to deduct from the moneys passing through their hands as is allowed similar trustees by the laws of the District of Columbia, provided, that if my company shall be appointed trustee as provided in item 18 hereof, then such trust company shall only be allowed such compensation as is usually charged by such company or other like company for such business, which said compensation shall be fixed in the order of appointment to be made by the probate court of the District of Columbia, as hereinbefore provided.

In testimony whereof, I, Thomas Kearney, hereunto affix and subscribe my name to this my last will and testament, this fourth day of June, A. D. 1896.

(Signed) THOMAS KEARNEY.

Signed, published and delivered by the said Thomas Kearney as and for his last will and testament in the presence of the undersigned, who at his request and in his presence, and in the presence

of each other, subscribe our names hereto this, the fourth day of June, A. D., 1896.

(Signed) FRANK B. EARNEST.
(Signed) JAMES B. HAYNES.
(Signed) A. V. WOODMAN.

Answer of Constance K. Vertner.

Filed May 15, 1900. J. R. Young, Clerk.

Separate answer of the defendant Constance K. Vertner.

This defendant admits all the matters and things averred in the bill of complaint in the above entitled cause.

Further answering said bill of complaint this defendant
23 states that she is advised and so avers, that the last will and testament of her father, the late Thomas Kearney, is void and of no effect to dispose of the real estate situated and lying within the District of Columbia for the reason that the provisions of said will relating to said real estate attempt to create such an estate as is contrary to the law forbidding the creation of perpetuities.

Further answering said bill this defendant states that said Thomas Kearney departed this life on or about the 4th day of July, 1896, leaving this defendant and her brother, Edmund Kearney, as his sole heirs at law. Edmund Kearney departed this life on or about the 4th day of June, 1898, leaving a widow, Mrs. Mary B. Kearney and this defendant, his sister, as his sole heir- at law. That said Edmund Kearney left a last will and testament, a certified copy of which is filed herewith, marked C. K. V. No. 1, and prayed to be read as a part of this bill, but this defendant is advised that said will is not in proper form to pass the title to real estate within the District of Columbia.

This defendant joins in the prayer of the bill of complaint for a decree of this honorable court declaring the proper construction of the last will and testament of Thomas Kearney, deceased, so far as the same relates to real estate lying within the District of Columbia.

STATE OF MARYLAND, *Washington County*, *ss:*

I do solemnly swear that I have read the above answer by me subscribed and know the contents thereof; that the facts therein stated of my personal knowledge are true and those stated on information and belief I believe to be true.

CONSTANCE KEARNY VERTNER.

Subscribed and sworn to before me this 14th. day of April 1900.

J. W. COOK,
Notary Public.

[SEAL.]

EXHIBIT "C. K. V. No. 1."

Filed May 15, 1900.

Last Will and Testament of Edmund Kearney.

LAREDO, TEXAS, *June 2nd*, 1898.

In the name of God, amen.

I the undersigned Edmund Kearney of Jefferson county, Mississippi, being of sound and disposing mind do make this my last will and testament. I give to our adopted niece Mayken B. Pierce, the sum of five hundred dollars, the sum to be held in trust by
24 my dear wife Mary B. Kearney and the same to be paid to said Mayken B. Pierce at such time or times as she may deem it best for the good interest of our adopted niece.

The remainder of my estate both real and personal, situated in the State of Texas or elsewhere or any property real personal or mixed which may hereafter accrue to my estate, I give and bequeath to my dearly beloved wife Mary Brandon Kearney, whom I hereby appoint sole executrix of this my last will and testament, I hereby cancel, annul & set aside any will or wills previously made by me.

In witness of all above written I hereunto set my name and seal this 2d June, 1898, in Laredo, Texas.

EDMUND KEARNY. [SEAL.]

Witness:

A. W. WILCOX.

Answer of Gabrielle K. Jordan.

Filed May 15, 1900.

Separate answer of the defendant Gabrielle K. Jordan.

This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth, she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in said bill of complaint to be true.

GABRIELLE K. JORDAN.

Verification waived:

THOMAS P. WOODWARD,

Solicitor for Complainant.

Witness:

LYBRAND SILL.

MELVINA SILL.

Memorandum.

May 22, 1900.—Guardian *ad litem* appointed for Lillie K., Edmund K. and Thomas K. Vertner, who on same day filed formal answer.

Memorandum.

May 23, 1900.—Replication joining issue and calendaring cause for hearing on bill and answers.

25 *Decree.*

Filed June 27, 1900.

This cause having been calendared, was submitted on the pleadings filed therein and duly considered, it is, by the court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuties and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that said provisions of said will are deemed and held to be void and of no effect and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs at law.

JOB BARNARD, *Justice.*

Memoranda.

(3) October 29, 1901.—Subpœna to all defendants issued and returned December 3, 1901, as to all "Not to be found."

(4) April 7, 1902.—Alias subpœna to all defendants issued and returned May 5, 1902, endorsed "Summoned defendant Leroy M. Taylor personally April 7th, 1902. Aulick Palmer, marshal. No copies for other defendants."

Memoranda.

(6) August 17, 1903.—Affidavits as to non-residence of all defendants except Taylor filed.

(7) August 17, 1903.—Order of court requiring all defendants to appear except defendant Taylor passed.

(8) September 25, 1903.—Proof of publication of order of August 17, 1903, filed.

(9) October 5, 1903.—John J. Hemphill appointed guardian *ad litem* for infant defendants Edmund K. and Thomas K. Vertner.

(11) October 7, 1903.—Affidavit of solicitor as to mailing notices to all defendants except Drake and Taylor filed.

(12) October 31, 1903.—Motion by defendant Drake to strike out

sub. paragraph ("b") of paragraph 1 of the 9th. paragraph of the bill of complaint as being scandalous, impertinent and immaterial.

(13) November 5, 1903.—Sub. paragraph ("b") of paragraph 1 of the 9th paragraph of the bill of complaint stricken out.

26

(14) *Demurrer.*

Filed November 5, 1903.

The demurrer of Constance K. Vertner and Lilly K. Vertner to the bill of complaint of Gabriella K. Jordan.

To the supreme court of the District of Columbia, holding an equity court:

These defendants by protestation not confessing or a-knowledging all, or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, do*es* demur thereto and for cause of such demurrer show*s:*

That the said complainant has not in and by her said bill stated such a case as does or ought to entitle her to the interference of this honorable court or to the relief prayed for, from or against *this* defendant-.

Wherefore and for divers other good causes of demur- appearing in said bill, these defendants do demur thereto and to all the matters and things therein contained, and pray judgment of this honorable court whether they shall be compelled to make any further or other answer to said bill, and that they may be hence dismissed with their costs and charges, in this behalf most wrongfully sustained.

JNO. J. HEMPHILL,
Solicitor for Defendants Constance K. and Lilly K. Vertner.

(15) *Demurrer of Elijah S. Drake.*

Filed November 5, 1903.

The demurrer of Elijah S. Drake, trustee, to the bill of complaint of Gabriella K. Jordan.

To the supreme court of the District of Columbia, holding an equity court:

This defendant by protestation not confessing or acknowledging all, or any of the matters and things in the said bill of complaint contained to be true in manner and form as the same are therein set forth, does demur thereto and for cause of such demurrer shows:

That the said complainant has not in and by her said bill stated such a case as does or ought to entitle her to the interference of this honorable court or to the relief prayed for, from or against this defendant.

27 Wherefore and for divers other good causes of demurappearing in said bill, this defendant does demur thereto and to all the matters and things therein contained, and prays judgment of this honorable court whether he shall be compelled to make any further or other answer to said bill, and that he may be hence dismissed with his costs and charges, in this behalf most wrongfully sustained.

THOMAS P. WOODWARD,
W. MOSBY WILLIAMS,
Solicitors for Defendant Elijah S. Drake, Trustee.

(16) *Opinion of Justice Anderson.*

Filed May 9, 1904.

Opinion delivered by Anderson, J., April 20, 1904.

This is a bill of review filed in this court on October 29th, 1901, by Gabriella K. Jordan against Elijah S. Drake and Leroy M. Taylor, trustees under the last will and testament of Thomas Kearney, deceased, Constance K. Vertner, his daughter, and Lillie K. Vertner, Edmund K. Vertner, and Thomas K. Vertner, the infant children of Constance K. Vertner, praying that the final decree passed by the supreme court of the District of Columbia on the 27th day of June, 1900, in equity cause No. 21,422 may be reviewed and set aside in so far as the same affects the right of the complainant Gabriella K. Jordan, to take under the sixth item of said will, and to remain in the undisturbed enjoyment of the rents and revenues derived from certain real estate situated in the District of Columbia, as therein provided.

To this bill demurrers were interposed by certain of the defendants, and after full argument, the points thus raised were submitted to the court for its decision.

The case presents the following facts: Dr. Thomas Kearney of San Antonio, Texas, died July 5th, 1896, possessed of a large estate, consisting of real and personal property in this city, and in the States of Virginia and Texas. By the terms of his last will and testament, his Washington real estate was devised to the defendants Drake and Taylor, trustees, to hold in trust for the purposes therein named, until the year 1928. A copy of his will, dated June 4th, 1896, was duly filed and recorded in the office of the register of wills for the District of Columbia November 6th, 1897, together with the renunciation of Dr. Leroy M. Taylor, one of said trustees and a defendant in this cause.

By the terms of the will it was provided that no further steps should be taken in the probate court of the District of Columbia than the filing of said will and an inventory of his Washington property.

28 On the 15th day of May, 1900, the defendant Elijah S. Drake, of Fort Gibson, Mississippi, the remaining trustee under said will of Thomas Kearney, styling himself as such trustee,

filed his bill in equity in the supreme court of the District of Columbia against his co-trustee, Leroy M. Taylor, and Constance K. Vertner, and her infant children, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, and the complainant to this bill—Gabriella K. Jordan, and filed therewith a copy of said will as an exhibit, and setting forth therein certain provisions of the will, relating to and disposing of certain real estate and rents, revenues and profits arising therefrom situated in the city of Washington, District of Columbia. Amongst other provisions so set forth in said bill are the following:

(Sets out items 6, 7 and 8 of will of Thomas Kearney.)

The said Drake, trustee, in and by the sixth paragraph of said bill averred as follows:

"6th. Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia and your complainant is advised that the said provisions are void because they attempt to create a perpetuity."

And by the third prayer of his said bill he prayed as follows:

"That by a decree of this honorable court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised."

And by the fourth prayer he prayed "that he shall have such other and further relief as the nature of the case shall require."

The complainant, Constance K. Vertner, one of the defendants to the present bill, filed her separate answer to the original bill to the effect that she admitted all the matters and things therein averred and further that she was advised and therefore averred that the will of her father, Thomas Kearney, deceased, was void and of no effect to dispose of the real estate situated in the District of Columbia for the reason that the provision of said will relating to said real estate attempted to create such an estate as is contrary to the law, creating perpetuities; that she and her brother, Edmund Kearney, were the sole heirs at law of the said Thomas Kearney; that said Edmund Kearney died on the 4th day of June, 1898, leaving a widow, Mary B. Kearney, and that she, the said Constance K. Vertner, was his sole heir at law; that the said Edmund Kearney left a last will and testament, a copy of which was filed with her said answer, and prayed to be read as a part thereof, but that she was advised that the said will of Edmund Kearney is not in proper form to pass the title to real estate in the District of Columbia, and she joined in the prayer of the bill for a decree declaring the proper construction of said will of Thomas Kearney, deceased, so far as it relates to real estate in the District of Columbia. The infant defendants, children of Mrs.

Vertner, and grandchildren of the testator, answered by
29 their guardian *ad litem*. Leroy M. Taylor, the co-trustee of

Drake, filed his answer in said cause, stating in substance and effect that he had renounced and declined to act under the will of Thomas Kearney, deceased, and thereby renewed said renunciation and declination.

To this bill the complainant, Gabriella K. Jordan in her proper person filed her separate answer as follows:

"This defendant being advised that the bill of complaint herein involved only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in the said bill of complaint to be true."

Issue was joined, but *no evidence was taken or testimony produced before the court* other than the copy of the will filed as an exhibit to the bill. Nor does there seem to have been any opposing counsel, the cause being submitted to the court on bill and answer, and the brief of the complainant's solicitor.

Thereupon, on June 27th, 1900, the court adjudged, ordered and decreed as follows:

"This cause having been calendared was submitted on the pleadings filed therein and duly considered, it is, by the court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed, that said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs at law. Job Barnard, justice."

No appeal was taken from said decree by any of the parties to said cause. Upon the filing of this decree the trustee Drake discontinued paying the complainant, Miss Jordan, the annuity of $40.00 per month, as provided by the sixth item of said will on the ground that the real estate in the District of Columbia charged with the payment thereof had been taken from his control by said decree, and that said legacy was no longer enforceable so far as he was concerned. Thereupon on October 29th, 1901, Gabriella K. Jordan, one of the defendants to said original bill, filed her bill of review in this court, naming the complainant in the original suit, E. S. Drake, trustee, and Constance K. Vertner, and her three children, already named, as defendants. She avers in her will that she has been greatly injured and aggrieved by said final decree, and by the construction of said will by the court, the effect whereof has been to deprive her of her said property devised to her for life by the sixth item of the last will and testament of Thomas Kearney, deceased. She therefore avers and insists that said final decree is erroneous and ought to be reviewed, reversed and set aside for errors and imperfections apparent on the face of the decree, and of the record and proceedings in said cause, averring that the decree, amongst other things, was erroneous in the following particulars:

1st. In decreeing relief upon said bill in the absence of proper and

necessary parties to the suit, neither the said Edmund Kearney, if he were living, or if he were dead, his personal representatives having been made a party; nor was any proof made that he died without issue him surviving; or that the said Constance K. Vertner was his sole heir at law; or that he died intestate.

2nd. In decreeing adversely to the complainant that the provisions of said will, so far as the same attempted to dispose of lands and tenements, within the District of Columbia, are deemed and held to be in violation of the law prohibiting the creation of perpetuities and decreeing that as to such lands and premises said Thomas Kearney died intestate, and that the same descended to his heirs at law.

3rd. That by reason of said decree she has been deprived of the annuity devised to her in the sixth item of said will, whereas she avers said devise is a perfectly legal and valid gift, being for the life only of the complainant, and not in contravention of the law prohibiting perpetuities, nor contrary to any statute, and that the said Thomas Kearney did not die intestate.

Wherefore she says that inasmuch as such errors appear in the body of said decree and in the record of the proceedings in said cause and there is no proof upon which to base such a decree deeming and holding that the testamentary disposition in her favor mentioned in and declared in the sixth item of said will to be in violation of the law prohibiting the creation of perpetuities, or contrary to the statute in such cases made and provided, as to such real estate situated in the District of Columbia, and no proof upon which to base any decree deeming and holding the said provision of said will to be void and of no effect, or that the said testator, Thomas Kearney, died intestate as to said real estate, or that the same descended to his heirs at law, as set forth in said final decree, she prays that said decree may be reversed and set aside, and that she be permitted to remain in the undisturbed enjoyment of the rents and revenues derived from said real estate as provided in the sixth item of said will.

She also prayed for general relief.

All of the defendants being served entered their appearance. The infant defendants, Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, by their guardians *ad litem*, and the defendants, E. S. Drake, trustee, and Constance K. Vertner, by their respective attorneys, filed their demurrers to said bill, which are now before the court for its disposition.

31 I.

The first question raised by the demurrers to the bill is, that the complainant has been guilty of laches in filing the same, and that, therefore, this bill should be dismissed.

Equity rule 88, relating to the filing of bills of review provides that "no bill of review shall be filed unless within two years *after entry of decree or order.*" The decree now under review was made June 27th, 1900, and although the *bill* was filed within less than *two years* after the entry of such decree, it is claimed that because

the order of publication was not made until August, 1903, some fourteen months after complainant's right to file her bill of review had elapsed, she has thus been guilty of such laches as defeats her right in equity to proceed in this cause.

The decree as stated was passed June 27th, 1900. The bill of review was filed October 29th, 1901, or within fourteen months after the passage of the decree. A subpœna to answer was issued October 29th, 1901, and was returned *nulla bona* December 3rd; an alias subpœna to answer was thereupon issued April 7th, 1902, which was returned May 5th, following, as served on the defendant, Taylor. The answer of Taylor was filed June 3rd, 1902, which was within two years from the passage of the decree. August 17th, 1903, an affidavit of non-residence was filed, and on the same day an order for appearance and publication was passed by the court, which was some three years and two months after the date of the decree.

The rule in equity is that "where a bill of review is filed, process should be taken out as in ordinary cases." Fletcher Eq. Pl. & Pr., sec. 941.

"The appearance of the defendant is enforced in the same manner as on an original bill. The case proceeds upon such bill as an original bill." 2nd. Daniell's Chan. Pl. & Pr., 4th ed. 1574.

In the case of Webb *v.* Pell, 1 Paige (N. Y.) 564, it was held that "where a subpœna was taken out upon a bill of review, and a *bona fide* attempt made to serve it, it was held to be a sufficient commencement of the suit, although the subpœna was not, in fact, served within the time allowed by law for appealing from the decree."

In view of the fact that the bill itself was filed within the two years prescribed by rule 88 of this court, just cited, and that the subpœna to answer was issued on the same day, and upon its return an *alias* subpœna to answer was issued, and duly served upon one of the defendants, who filed his answer to the bill within the two years, to wit, on June 3rd, 1902, it cannot be seriously contended that because of the order of publication, to bring in the other defendants was not passed until August 17th, 1903, it was beyond the two years' limitation, and that, therefore, the proceeding was not instituted within the time prescribed. The bill itself having been filed within the time, and successive *bona fide* attempts thereafter having been made to serve the other defendants,
32 and that failing in this they were then brought in *my* publication, although such publication was beyond *the* two years' limitation, meets all the requirements of the rule.

II.

The next question presented by the demurrer is that Mrs. Mary V. Kearney, the widow of Edmund Kearney, the deceased, son of the testator, is a material party to this bill of review, and that the omission to make her a party is fatal to the bill. This contention is based upon the view that Mrs. Kearney became entitled to dower in said lot 611 M street, upon the filing of the decree of Mr. Justice Barnard, declaring the will of Thomas Kearney invalid as to such

real estate, and that the same descended to his heirs at law as if he had died intestate.

I do not think there is any force in this contention. The original bill did not make her a party and under equity rule 40 this court has full power to enter a decree saving the rights of all parties not before it, whose rights might otherwise be lost or prejudiced.

The rule as announced by Mr. Fletcher in his Equity Pleading and Practice, sec. 925, is that "All parties whose interest are to be affected by the *original decree* are necessary parties to the bill of review."

The interest of Mrs. Mary V. Kearney was in no way affected by the original decree, and therefore, under the rule just announced she is not a necessary party to the bill of review.

It was held in Corcoran *v.* Couper, 2 Del. Ch. 27 "that a bill of review lies against those who were parties to the original decree and against them only."

The true rule seems to be that failure to make a *material* party to the *original bill* a party to the bill of review is ground for demurrer, but where such person is not a *material party* to the *original bill* a demurrer does not lie. In any event in the disposition I am about to make of these demurrers, the interests of Mrs. Kearney, no matter what they may be, will be in no wise affected, and, therefore, she is not a material party to this proceeding.

III.

The demurrers filed by these defendants, of course, admit all the averments of the bill that are well pleaded, and hence they admit the execution and terms of the will, and the decree of the court as therein stated, but for cause of demurrer says that the complainant has not in and by her said bill stated such a case as entitles her to the interference of this court, or to the relief prayed for. In considering the construction to be put upon this will two general questions are presented:

First. Whether in the will of Thomas Kearney, deceased, his real estate in the city of Washington was so devised as to be contrary to the law creating perpetuities.

33 Second. If so, what effect, if any, have such void devises upon item 6 of the will in favor of the complainant.

It is contended on behalf of Miss Jordan, the complainant, that whether the limitation over to Thomas K. Vertner, is good or bad, the trust in favor of the complainant is not thereby affected, for the reason that it is a distinct and separate trust, standing apart from the other provisions of the will and capable of as full and complete enforcement and execution as if no other trust was thereby created. On the other hand, it is contended by the defendants that the will creates but a single estate in trust; that such estate must run without interruption until 1928; and that, therefore, the provisions of item 6 in favor of the complainant do not create a separate and distinct estate or interest in her favor.

The law in relation to perpetuities in this District at the time this will took effect is embodied in sec. 2 chap. 70 of Abert's Digest, and

is as follows: "No will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses, not now permitted by the constitution or laws of the State." (Maryland.)

By the act of Congress of Feb. 27th, 1801, this provision was made applicable to the District of Columbia.

The Supreme Court of the United States in Ould *v.* Washington Hospital, 95 U. S. 303, defined a perpetuity under this act as: "A limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years, with a fraction of a year added for the term of gestation, in cases of posthumous birth."

By the terms of the statute the person or persons by whose life or lives the period is measured must be *in esse* at the time of the creation of the interest or estate. Item 8 of the will, as above quoted, vests the fee simple title in lot 611 M street, N. W., in Thomas K. Vertner, the testator's grandson, upon the death of the complainant Miss Jordan, provided, that if she dies *before January 1st, 1928, he* shall only receive the net rents and revenues derived by the trustees therefrom, and *provided further*, that in the event the complainant dies *before Thomas K. Vertner shall have attained the age of twenty-one years, then, from the death of the complainant, until* he shall have arrived at the age of twenty-two years, the rents from said lot 611 M street, N. W., shall be disposed of in the same manner as provided in item 7 of the will in regard to rents and revenues from other property mentioned therein, except the vacant lot on 20th street N. W., viz., to the payment of taxes, insurance, repairs &c.

In interpreting this clause of the will in connection with the sixth clause, it is plain that in no event can the absolute title vest in Thomas K. Vertner before 1928, even though the complainant should die prior to that date, because if complainant dies before 1928 Thomas K. takes nothing but the rents of the lot, and if she dies before 1928, and while Thomas K. Vertner is yet under
34 twenty-one, then from the date of her death until he does attain the age of twenty-two he takes nothing, as during that period the rents go to the trustees to pay taxes, insurance and repairs, as provided in item 7. Hence it follows that this devise is limited by years and not by lives—that is, this property goes into the hands of trustees for a certain specified time, viz: until 1928, and, therefore, the power of alienation is suspended until that date. As the power of alienation therefore cannot be exercised until *at least* 1928, and not then, if Miss Jordan is still living, it follows that the devise to Thomas K. Vertner is void, as the period of alienation is beyond, or possibly beyond, a life or lives in being, and twenty-one years more.

"In applying the rule against perpetuities, the character or nature of the contingency or event upon which a future interest is limited is of no moment. The only consideration is whether this event, whatever it may be, will happen within the period prescribed by the rule." Am. & Eng. Ency. Law., 2nd. ed. vol. 22, page 707.

In determining this question it is an invariable principle that regard is to be had to possible and not merely to actual events. It is

not determined by looking back on events which have occurred, and seeing whether the estate has extended beyond the prescribed limit; but by looking forward from the time the limitation was made, and seeing whether, according to its terms, there was then a possibility that it might so extend." *Ib.* 707.

While this will is somewhat involved, it seems to be comparatively clear in so far as it relates to the purposes of the trust and the disposition of testator's real estate. By item 5 of the will the testator devises to the trustees named in the will, Leroy M. Taylor, and E. S. Drake, *"and their successors"* the real estate in question, in trust for the purposes stated, *"said trust to be continued in them and in their successors until January 1st, 1928, said trustees and their successors to have full, free and absolute possession and control of the same until the date last above mentioned, with full power to let and lease the same for said period," &c.*

By this clause of the will these trustees are clothed with the legal title to this property and the right of possession and with authority to let and lease the same until 1928, thereby in terms suspending the terms of alienation until that date, no matter what contingency may arise, and I may add even to a later date should the complainant survive that period. The same is true as to the balance of his Washington property, which by item 21 he devises to his grandchildren, Lillie K., Edmund K., and Thomas K. Vertner, the children of his daughter, Constance K. Vertner, "Provided that if my daughter, Constance K. Vertner, *shall be living on the 1st day of January, 1928, then said title shall not vest in my said grandchildren on said date, and not until the death of their said mother, but, upon her death, provided she does not die until the 1st day of January, 1928,* said title shall immediately vest as above provided in
35 said item." It follows from this that not only the vesting of the property intended for Thomas K. Vertner, but the remainder of the testator's Washington property intended for his grandchildren is postponed for a period that may be longer than a life or lives in being and twenty-one years, and *therefore,* as no power of sale is vested in the trustees, and the ultimate beneficiaries take no title until 1928, these devises are clearly void under the rule relating to perpetuities. This brings the will clearly within the rule laid down by the Court of Appeals in Cruikshank *v.* Home of the Friendless, 113 N. Y. 337, in which the court says: "A period measured by years and not by lives in being during which there will be no persons in existence by whom an absolute estate in possession can be conveyed brings an estate within the rule against the unlawful suspension of alienation." Here there is a suspension of the right of alienation for a given period, a period measured by years and not by lives in being.

"If the trustees have the power to sell, the instrument is valid, but if the power to sell is absolutely suspended for the prohibited period, it is void." Thatcher *v.* St. Andrews Church 37 Mich. 271; Belmont *v.* O'Brien, 12 N. Y. 394.

In so far, therefore, as the will of the testator undertakes to vest the fee simple title to his Washington real estate in the beneficiaries

therein named, his will is void to that extent at least, and the court was clearly right in so holding,—with the exception perhaps of the title to the vacant lot on 20th street which is to vest in Lillie K. Vertner when she attains the age of 19 years, provided if the testator improved the lot during his life-time, then the title is not to vest in her until January 1st, 1928, as provided by item 7. Nor do I understand that the complainant in this bill raises any question as to the construction put upon the testator's will in this respect, and I have only considered it in so far as it seemed to me was proper and necessary in the determination of the real question in issue between the parties arising upon these demurrers. But, admitting that the fifth clause of the will, which devises all of the Washington property to Taylor and Drake, trustees, and their successors, to hold and manage the same continuously until 1928, does create a condition where the power of alienation is by possibility suspended for a period prohibited by the law relating to perpetuities, is the sixth clause of the will, which gives to Miss Jordan the entire rents of lot 611 M street, northwest, during her natural life &c., inoperative? I think not; that provision is for her own life only, is easily separable from these void provisions of the will, and is valid as a separate and independent trust although the remainder of the trust is, and has been by Mr. Justice Barnard declared to be, void. I do not understand that by the terms of the sixth item of this will Miss Jordan takes a vested interest or estate in lot 611 M street, northwest, but, on the contrary, that she takes a mere annuity which is made a charge or incumbrance thereon, to the extent of the full rents thereof as well as a charge upon the residue of his estate to the
36 extent of $40.00 per month during her natural life, this to be paid primarily out of the rents of lot 611 M street, northwest, if sufficient for that purpose, and if not, the balance not covered by the rents of this lot to be paid out of his general estate.

"Where an interest or estate is given by a deed or will with a limitation over on a specified contingency, such limitation, if it violates the rule against perpetuities, is, for the purpose of determining the effect on the prior disposition of the property, to be considered as stricken out, leaving the prior disposition to operate as if the limitaton over had never been made." Am. & Eng. Enc. Law, 2nd ed. vol. 22, p. 723, citing Lovering *v.* Worthington, 106 Mass. 86, and Leonard *v.* Burr, 18 N. Y. 103.

It is contended, however, by the defendants that, while admitting the general doctrine that a valid trust may stand where an invalid one must be rejected, this doctrine cannot be here applied to give effect to the sixth clause of the will in favor of the complainant. It has been argued on behalf of the defendants that all the authorities cited by the complainant's counsel in support of the application of the doctrine to this case, are confined to cases where it has been held that "where a testator creates a trust running through more than two lives," the trust may be declared good as to the two lives in being, and invalid as to the lives which are to follow. It is insisted, however, that that is an entirely different proposition from the one involved in this case; that in this case the property goes into the hands of the

trustees for a specific period, to wit, until 1928; and that this, according to the authorities, is void.

It is also urged that the whole scheme of the will shows that so far as the Washington property is concerned, the testator intended that it should be held by the trustees until 1928, and that such a will cannot be sustained in part and void in part, as such an interpretation would interfere with the intention of the testator. If this is the correct interpretation of this will, it follows that this annuity or rent-charge in favor of the complainant must be held invalid along with the other invalid conditions of the will as in violation of the law relating to perpetuities. The title to No. 611 M street which the trustees are to hold during the life of Miss Jordan for her use and benefit to the full extent of the rents and profits thereof is disposed of to Thomas K. Vertner in item 8 of the will, wherein it is provided in substance, as we have already seen, that at her death the fee-simple title to said lot shall vest in Thomas K., provided however that if Miss Jordan dies before January 1st, 1928 then he shall only take the rents and profits derived by said trustees therefrom, and provided further that should Miss Jordan die before Thomas K. shall have attained the age of twenty-one years then from the date of her death until Thomas K. arrives at the age of twenty-two years the rents and profits from said lot shall be disposed of in the same manner as provided in item 7, from which it seems to follow
37 that the absolute title shall not vest in him until 1928. Therefore it is insisted, as the power of alienation is suspended until 1928, and as Miss Jordan may die at a date more than twenty years before 1928, such suspension of the vesting of the title and of the consequent power of alienation is unlawful and the entire will fails.

Does the fact, however, that this property is thus placed in the hands of the trustees for a specific period, to-wit—until 1928,—thereby suspending the power of alienation until at least that date,—also render unlawful the annuity or rent-charge against the same property in favor of the complainant during her own life? To answer this question correctly involves a consideration of the primary purpose of the testator's will, if such primary purpose exists and is clearly distinguishable and separable from the other provisions of this will.

Intention.

"In construing a will it has been said that the intention of the testator is the polar star by which the court should be guided, provided no rule of law is thereby infringed." Broom's Legal Maxims, p. 409.

"In other words, the first thing for consideration always is what was the testator's intention at the time he made the will, and then the law carries that intention into effect as nearly as it can, according to certain settled technical rules." *Ib.* 410.

Yet this is to be observed with these two limitations, first, his intent ought to be agreeable to the rules of law; second, his intent ought to be gathered out of the words of the will. *Ib.* 412.

Applying these rules of interpretation to this will, it is manifest that it is the plain duty of the court to overrule this demurrer. Considering its several clauses in the light of the whole instrument and applying thereto the recognized rules of construction, it seems clear, that, so far as lot No. 611 M street is concerned, the primary purpose of the testator in writing into his will items 6 and 8 was to provide therefrom, that is, from the rents of said lot, for the support and maintenance of his niece during her life, and to that end he *first* charged or encumbered the lot to the extent of the total rents thereof during her life, as well as the *entire estate* with such *additional sum* as the trustees might find necessary to enable them to pay to her a monthly income of forty dollars, and, *secondly*, that upon her death, if she died on or after January 1st, 1928, the absolute title thereto was to vest in his grandson Thomas K., but if she died before 1928 he was to take title at the latter date, but not before. And in making this provision for the support of his niece during her life he was careful to see to it that this proivsion should not be involved in any entangling alliances with the other trust provisions of his will. Hence he left it in such shape that the trust in favor of Miss Jordan could be effectuated and carried out to its fullest completion without let or hindrance so far as his trustees, or the other beneficiaries of his will were concerned. This presents a
38 case of two separate and independent trusts in respect of the same property, the primary trust being in the nature of a rent-charge upon this lot for the support of the complainant during her life, and the secondary trust vesting the fee simple title to the same property in his grandson after such property had served the full purpose of the primary trust, and after the expiration of the period limited by the will when the title thereto could vest in said grandson. Being the absolute owner of the property and competent to make a will, the testator had the right to make such disposition of his property and to create such trusts as he deemed necessary to effectuate his purpose, providing that such disposition and trusts were not illegal in themselves, or did not violate any positive rule of law or statute, applicable thereto. Although it is conceded, as we have already seen, that the devise to Thomas K. Vertner is void, because in violation of the law pertaining to perpetuities, it does not follow that the trust created in favor of the complainant is void for the same reason. In the first place, it is not illegal in itself, and in the second place it is easily separable from the other provisions of the will, and is in no wise dependent upon them either for its origin or execution. It stands alone, and upon its own merits, as representing a separate and independent purpose. It is apparent that this view of the subject was not brought to the attention of the justice who passed the decree upon the original bill now under review.

In the last item but one of the will, the testator directs that Thomas K. Vertner shall be vested with the title and ownership of the F Street property (provided his mother is not living) in 1928, but he does not provide that he shall take the title to the M Street property at the same date, as the vesting of the title thereto is absolutely suspended until the death of the complainant. This is in effect a

reiteration of his declared intention as we find it in the sixth item of his will that the title to the premises 611 M street shall remain in his trustees for the benefit of his niece as long as she lives, thus indicating a purpose to create, and, in fact, creating, a separate and individual trust for his niece during her life.

Indeed, items six, seven, eighteen, nineteen and twenty-one each and all support the contention that the testator intended and does treat the allowance or provision made for Miss Jordan as an independent and separate legacy, and therefore in restoring to the complainant the annuity provided for her, it is not necessary in order to give full effect thereto to restore the will in its entirety, for the simple reason that the will under consideration is one in which separate and distinct trusts are created. The trust in favor of the complainant is in the nature of a rent-charge, which is something reserved out of realty or fixed as a burden on an estate in lands, and in this case can be enforced by an appropriate proceeding as though it were the sole provision of the will. Item six of this will in no way touches the estate or restrains its alienation, while the balance of the will deals with the estate itself and provides for its
39 alienation, but, unfortunately for the beneficiaries therein named, unlawfully limits the period when it is to take effect. These latter provisions being void because the limitation extends beyond the period of perpetuity, it becomes the duty of the court to construe the balance of the will as though such clause or clauses were not inserted in it, providing the manifest intention of the testator will thus be carried out.

The authorities are numerous in support of the proposition that if the purposes of the trust are separable and some of them are void because they fall within the inhibition of the rule against perpetuities and others are free from such objections, those which are within the period are sustained though the others must be declared void.

In the case of Savage *v.* Burnham, 17 N. Y. 561, the testator devised his real and personal property upon these trusts: First, to sell the real estate after the death of the widow. The sons to receive their shares when they attaind the age of twenty-one years and the daughters when they are married. In this case, the court held the trusts to be valid. But, the limitations expressed in the will, by which *the share of each son* dying under twenty-one and daughters without issue, was to go to the surviving children upon the same contingency as to each taker as that on which an original share would have vested, were declared void because suspending the absolute ownership of such shares during one or more minorities in addition to the life of the widow and the first taker. The court held that the main intent of the testator was preserved by supporting his primary disposition, although the ulterior limitations were defeated. The court in discussing this question said:

"It has sometimes been said that the maxim 'void in part void in toto' expressed a general principle of law; but in reality it does not, as every one must see on a moment's reflection. In the nature of things, in reason and above all in justice, it may and must be true that a deed or will or other instrument can in part be good

although another part is void, because in contravention of positive law."

Further on in the opinion the court says:

"Can those ulterior limitations be dropped and the primary dispositions of the estate be allowed to stand? This should be done if the intention of the testator will thereby be effectuated rather than defeated. It is easy of demonstration that such will be the case. In solving such an inquiry we are entitled to look not only at the will, but at the external circumstances in order to see its practical results."

This case is cited with unqualified approval in the subsequent case of Harrison *v.* Harrison, 36 N. Y., 547.

That it was the intention of the testator that the provisions of his will relating to the complainant should be recognized and treated as a separate and independent trust is plainly manifest from the safe-guards that he throws about it wherever he touches upon the subject in his will. For instance, in item twenty-one he says:

"For fear that there may be some difficulty in construing the different provisions of the will, relating to the monies which may come into the hands of the trustees herein named, I desire to say that it is my intention that all the monies arising from the rents of the Washington property, except that which is to go to Gabriella K. Jordan, shall be placed in the common fund for the payment of taxes and insurance on said property" &c.

He thus makes plain his purpose that the monies thus coming into the hands of his trustees shall be divided so that all the moneys arising from the rents of his Washington property, except the rents accruing from 611 M street, shall be placed in a common fund, while the rents from the latter shall be set apart and maintained as a separate and distinct fund for the use and support of the complainant during life. This was not only a legitimate, but a perfectly natural thing for him to do. The complainant was his niece, a child of his sister, and, therefore, it was most reasonable and natural that he should thus make separate provisions for her and to make it a charge upon specific property, so as to insure to her a reasonable sum for her support so long as she might live, and at the same time he was properly careful to so make it as not to interfere with the alienation of the property itself.

In the case of Dupre *v.* Thompson, 8 Bar. 537, the court held that although certain trusts in a conveyance were void as suspending the power of alienation, yet where the other trusts are valid the whole instrument will not be declared void, providing the legal parts do not *of necessity* uphold the illegal parts.

To the same effect are also James *v.* Veasley, 14 Hun. 523; Burley *v.* Everlyn, 16 Sim. 294; Gladdner *v.* Hancock, 16 Sim. 371.

If I am correct in this view, then such intention should be carried out unless the *purpose* is unlawful (which it is not) or it defeats the general scheme of the will. Instead, however, of defeating the general scheme of the will, complete effect can be given to item 6 without relying in the least upon the other clauses of the will, as the com-

plainant can take under that clause of the will without regard to whether the other clauses thereof are good or bad, within the meaning of the law relating to perpetuities. The trust created in her favor is a separate and independent trust that terminates at her death without regard to whether she dies before, on, or after January 1st, 1928. The mere fact that the secondary trust in favor of Thomas K. is unlawful, by reason of the unlawful limitation placed upon it, cannot defeat the primary purpose of the testator, or in other words the primary trust itself, it being a perfectly legitimate and legal trust; nor would such primary trust fail had the testator not named trustees to carry it out, as it is a rule of equity that a trust will not fail for the want of a trustee, since courts of equity have the power to supply the necessary trustee. Whether
41 the secondary trust in favor of Thomas K. Vertner is void because it is subject to a limitation which renders it inalienable beyond the period allowed by law, that is, beyond a life or lives in being and twenty-one years thereafter, as provided in the act of Congress of February 27th, 1801, and as defined by the Supreme Court of the United States in the case of Ould *v.* Washington Hospital, 95 U. S. 303, or whether it is void because it comes within the rule laid down by the New York court of appeals in Cruinkshank *v.* Home for the Friendless, 113 N. Y. 337, namely, because there is contemplated "a period measured by years and not by lives in being during which there will be no persons in existence by whom an absolute estate in possession could be conveyed," thus bringing it within the rule of unlawful suspension of the power of alienation, is wholly immaterial, if the court is correct in concluding that the primary trust in favor of the complainant is a separable and independent trust. The rule is quite well settled that an ulterior limitation, though invalid, will not be allowed to invalidate the primary dispositions of the will, but such ulterior limitation will be cut off in the case of a trust which is not an entirety as well as in the limitation of a legal estate. Or, to put it differently, a trust created for two or more purposes, one lawful and another unlawful, is good for the lawul purpose though void as to the unlawful one, and therefore where property is vested in trustees upon various trusts some of which are valid and others void, it is the duty of the court to separate those which are legal and valid, if they can be separated, from those which are illegal and void. This, however, may not be done if it defeats the general scheme of the will, nor, if the otherwise valid trust is dependent upon the illegal and void trust for its own validity and execution.

In case of Shipman *v.* Rollins *et al.*, 98 N. Y. 311, furnishes a good illustration of an inseparable trust. It was there held that inasmuch as the bequest was void because it was not to be paid over until after the determination of *three lives in being at the death of the testator,* thereby resulting in an illegal suspension of the powers of alienation beyond *two lives,* the bequest of the *income of the fund* was likewise void. The foundation being condemned, the superstructure resting upon it fell with it.

Read syllabus at page 311.

Read opinion at page 330.

The case of Tiers *vs.* Tiers, 98 N. Y. 568, furnishes an equally apt illustration of separable trusts. There the court held that where the ulterior contingent limitation was separable from and merely incidental to the primary trust, its failure did not affect the validity of such trust.

Read entire opinion at pages 572, 573, 574.

Among other cases cited by counsel for defendants were Armory *v.* Lord, 9 N. Y. 403, and Knox *v.* Jones 47 N. Y. 389. While time will not admit of any attempt at reviewing these cases, as well as other cases cited by counsel, on both sides, it is sufficient to
42 say that in both of the cases just mentioned the court unhesitatingly recognizes the principle that a void trust when separable from a valid trust may be cut off. In each of these cases, however, the court was of opinion that this principle did not apply. These cases as well as the other cases cited on behalf of the defendants are, I think, clearly distinguished from the case at bar. The court in its opinion in the case of Armory *v.* Lord, in construing the will in that case said:

"The legal and valid objects of the trust, namely, the estate in the rents, profits, etc., devised for the benefit of the children, and the remainder in fee in the grandchildren are so mixed up with the illegal and void one (the life estate in the surviving husband or wife) that it is impossible to sustain the one without giving effect to the other."

Now, there is no such situation here. The trust created in favor of this complainant, as I have adready said, is in nowise dependent upon the other provisions of the will either for its origin or its execution. It stands separate and apart from all of the other provisions of the will. It is perfectly natural that the testator would do what he did. The complainant was his niece—not a member of his own individual household and not a member of the household of his daughter Mrs. Vertner. She was a relative who stood outside of both of these families and for whom the testator evidently had an affection which prompted him to make provision for her during her life-time. Therefore, he laid his hands upon one particular piece of his property, and he said in effect that while I shall write nothing in this will that shall affect the right of alienation of this property, I will write a provision that will ensure to this complainant, my niece, the sum of at least $40.00 per month during her natural life, and in order that her right to enjoy that income may not be in anywise defeated I will see to it that it shall not be alienated to her prejudice during her life-time, and that the rents arising from this property shall not be put into the common fund provided for in this will, but shall be kept separate and apart therefrom and used exclusively for the payment of this annuity; and, so considerate was he of her welfare and so determined was he that she should have at least $40.00 per month during her life-time, that he provided that if the rents of the M Street property were not sufficient to pay the $40.00 a month, then, in that event, it shall be, and is made, the duty of his trustees to make good the deficiency out of the balance of his estate.

So, as I have already said, wherever he touches upon the interest given to this niece, he indicates a purpose to keep the interest provided for her separate and apart from the residue of his estate, and safeguards it so that it will be paid to her by his trustees, no matter who they may be and no matter what may be the outcome of the other trusts sought to be created by the will. In other words, in the case at bar the will segregates a certain piece of real estate from the entire holdings of the testator and appropriates the rents and profits thereof to the separate and individual use of one beneficiary.

Therefore, no matter what may happen, the circumstance
43 that the limitation may or may not be good can not invalidate the preceding life estate or life interest in the rents and profits of such property.

It is proper to say in conclusion that, apart from the trusts created in favor of the complainant, a trust is also created by this will in favor of Lillie K. Vertner, whereby under the seventh clause of his will she is to take the fee-simple title to the vacant lot on 20th street upon her attaining the full age of 19 years, providing the testator made no improvements thereon during his lifetime, but if such improvements were made, then, in that event, the fee-simple title is not to vest in her until the 1st day of January 1928. No testimony was taken under the original bill as to this or any other matter of fact necessary to be established in order to aid the court in the construction of said will. While I am advised by the solicitors on both sides that no such improvements were made, still, in the absence of a stipulation to that effect, the statement of counsel in open court cannot supply the place in the record of formal testimony as to this matter. Assuming that no such improvements were made, it follows that Dr. Kearney did not die intestate as to all of his real estate situate in the city of Washington, but on the contrary he died testate as to his vacant lot on 20th street, and his trustees take and hold the title thereto for the purpose therein named, while the annuity in favor of Miss Jordan stands as an incumbrance or rent-charge primarily against lot No. 611 M street, and secondarily against his entire estate for any balance of $40.00 per month that the rents of said lot 611 M street may not yield.

The decree, therefore, should be drawn in acordance with these suggestions, and if such stipulation is entered into as suggested, then the cause will be referred to the auditor to ascertain and report to this court as to the rents and profits of 611 M street and the amount due therefrom to the complainant.

THOS. H. ANDERSON,
Associate Justice.

(17) *Petition.*

Filed July 7, 1904.

To the supreme court of the District of Columbia, holding an equity court:

Your petitioner respectfully represents and shows as follows:

1. That she is the complainant in the above entitled cause, and

that after the argument of this cause on demurrer, and after the court had delivered a written opinion overruling the said demurrers of defendants, Constance K. Vertner, Lillie K. Vertner and Elijah S. Drake, trustees, but before the decree could be signed the said defendants, Constance K. Vertner, died testate on or about the 6th day of June, A. D. 1904.

44 2. That the only heirs at law of the said Constance K. Vertner are her children, Lillie K. Vertner, Thomas K. Vertner, and Edmund K. Vertner, who are all of them defendants in this cause; the said Lillie K. Vertner having appeared by counsel, and the said Thomas K. Vertner and Edmund K. Vertner by their guardian *ad litem*.

3. That by the last will and testament of said Constance K. Vertner, dated the 7th day of March, A. D., 1903, Charles S. Landram and John A. Broaddus, both of Luray, State of Virginia, were constituted executors of the said will, and have duly qualified as such.

Wherefore, the premises —, your petitioner prays:

1. That this honorable court will pass an order making the said Charles S. Landram and John A. Broaddus, executors, parties to this cause, and that a subpœna issue out of this honorable court commanding them to appear and be made parties to this suit.

2. And for such other and further relief as the nature of the case may require.

GABRIELLA K. JORDAN,
By CHARLES F. WILSON,
Attorney in Fact.

(18) *Copy of Mrs. Vertner's Will.*

Filed July 7, 1904.

I, Constance Kearney Vertner, of the town of Luray, Page county, Virginia, do make this, my last will and testament, as follows:—

I direct that all my debts and funeral expenses be paid by my executors, hereinafter named, as soon after my death as conveniently may be. And as to such worldly estate as I may die seized or possessed of, I dispose of the same as follows:—

(1.) First, the property owned by me in the city of Washington, D. C.; consisting of a lot of ground fronting one hundred and fifty feet and ten inches on "F" street N. W. and running back along "20th" street ninety six feet and four inches, upon which lot there are situated eight three story and basement dwelling houses, being numbers 2000, 2002, 2004, 2006, 2008, 2010, 2012 and 2014, all fronting on "F" street, N. W., and all being lots numbers twelve and thirteen, square one hundred and four of said city, leaving a vacant lot on the same square and in the rear of the said eight houses, which vacant lot fronts about eighteen feet on 20th street and runs back one hundred and fifty feet and ten inches, the said vacant lot being also my property.

I also own in the said city of Washington two other lots, with the improvements thereon, known as lots numbers 611 and 613 "M"

street N. W. All of the foregoing property I wish to be kept
45 intact until my youngest son, Thomas Kearny Vertner, attains the age of twenty-one years, and the rents and profits thereof to be collected by my executors and applied by them as hereinafter provided. As soon after my son, Thomas Kearny Vertner, attains his majority as is deemed practicable and expedient by my executors I direct that the said property be sold by them upon such terms as to cash or credit as to them may appear reasonable and proper and the proceeds of sale, after the payment of expenses of sale, be paid in equal shares or amounts to my three children, Lily Kearny Vertner, Edmund Kearny Vertner, and Thomas Kearny Vertner, except that I wish my daughter, Lily Kearny Vertner, to receive one-sixth more of the net proceeds of sale than my two sons named above.

The foregoing provisions relating to the said property, both as to the rental and sale, are made subject to the dower rights therein of Mrs. Mary Brandon Kearny, the widow of my deceased brother, Edmund Kearny, and in the event of her death before a sale of the said property as above directed it is my will and desire that my said daughter, Lily Kearny Vertner, shall receive out of the rents and profits of the said property the same amount as received by the said Mary Brandon Kearny until there shall be a sale of the same, as aforesaid. The rest of the said rents and profits shall be paid by my said executors in equal shares or amounts to my three children named above, and when the said property is sold one-sixth part of the net proceeds of sale shall be first paid to my said daughter and the residue thereof shall be equally divided between my said three children.

I wish however that my said sons shall each go to some college or university for the education of young men for a term of three years and that a sufficient sum be appropriated by my executors from the rents and profits of the said property for that purpose before there shall be any distribution thereof as above provided. In the event of my death before my said son, Thomas Kearny Vertner, becomes twenty-one years of age and in the judgment of my executors the occasion arises when it would be to the best interest of my said children that the said property should be sold during the minority of my said son my executors are authorized and empowered to make such sale under the terms and conditions above expressed, the proceeds of such sale to be securely invested by them until my said son arrives at the age of twenty-one years. Secondly, whatever interest I may have or receive under the will of my father, Thomas Kearny, in and to his ranch lands situated in Webb county, Texas, known as the "Galvan ranch" I give, devise and bequeath the same to my daughter, Lily Kearny Vertner, forever.

Thirdly, I own and hold at the present time the following shares of stock in the corporations mentioned:—

One share of stock in the Laguna Chica Plantation Company, of St. Louis, Missouri, par value $100.00, certificate No. 226.

46 One hundred shares of the stock of the Doremus Automatic Vending Company, of New Jersy, par value $100.00, certificate No. 398.

One hundred shares of the stock of the Birmingham-Beaumont Oil and Transportation Company, of Birmingham, Alabama, par value $10.00, certificate No. 4192.

Two hundred shares of the Mobile-Beaumont Oil Company, of Mobile, Alabama, par value $20.00, certificate No. 2680.

The shares of stock in the first named company I give and bequeath to my daughter, Lily Kearny Vertner, and the shares of stock in all of the other companies mentioned I give and bequeath to my two sons Edmund Kearny Vertner and Thomas Kearny Vertner to be held by them jointly.

Fourthly, the household furniture contained in the residence in Luray, Virginia, occupied by me I wish to be sold by my executors and the proceeds equally divided among my children.

The books and pictures in the said residence are not to be sold however but shall be equally divided among my children. All of my silver ware and jewelry and personal wardrobe I give and bequeath to my daughter Lily Kearny Vertner.

Fifthly, I give and bequeath to Mrs. J. V. S. Harris, of Fort Gibson, Mississippi, the sum of one thousand dollars, and to Misses Amanda Davis and Mary Jane Davis, of Luray, Virginia, I give and bequeath the sum of one hundred dollars, each, and I charge all of my estate, both real and personal, with the payment of the said legacies. I prefer however that the same be paid out of the rents and profits of my Washington city property or from the proceeds of the sale of the same as heretofore directed. If the rents and profits of the said property do not justify it, having due regard to the maintenance and support of my children and the education of my two sons as above provided, my executors are directed to withhold the payment of the legacy of one thousand dollars to the said Mrs. J. V. S. Harris until there shall have been a sale of the said property.

Sixthly, all the residue of my property, both real and personal, wherever situate, I give, devise and bequeath, to my three children heretofore named.

Seventhly, having full confidence in the probity and business capacity of Charles S. Landram and John A. Broaddus, of Luray, Virginia, I hereby nominate and appoint them as the executors of this my will and desire that no security shall be required of them as such. I also appoint them as the guardians of my son, Thomas Kearny Vertner, during his minority.

Eighthly, I hereby revoke all previous wills and codicils hitherto made by me.

Witness my hand and seal this 7th day of March, in the year 1903.

CONSTANCE KEARNY VERTNER. [SEAL.]

47 Signed, published and declared by Constance Kearny Vertner, as and for her last will and testament, in the presence of us, who in her presence, at her request, and in the presence of one another, have hereunto subscribed our names as witnesses.

WM. L. HUDSON.
F. W. WEAVER.
E. T. BOOTON.

Codicil.

I, Constance Kearny Vertner, of Luray, Page county, Virginia, do make this codicil to my last will and testament, above written, which is to be taken as a part thereof.

I hereby reduce to the sum of eight hundred dollars ($800.00) the pecuniary legacy of one thousand dollars, ($1,000.00) given in the fifth clause of my said last will and testament, to Mrs. J. V. S. Harris, of Fort Gibson, Missi-ppi, and the sum of two hundred dollars, ($200.00) the difference the said two sums of money, I direct shall be added to the legacies given in the said clause to Misses Amanda Davis and Mary J. Davis, of Luray, Virginia, thereby increasing the legacy of each of them from one hundred dollars ($100.00) to the sum of two hundred dollars ($200.00).

In testimony whereof, I have hereunto affixed my hand and seal this 14th day of May, 1904.

CONSTANCE KEARNY VERTNER. [SEAL.]

Signed, published and declared by Constance Kearny Vertner, as and for a codicil to her last will and testament, in the presence of us, who, in her presence and at her request, and in the presence of one another, have hereunto signed our names as witnesses thereto.

WM. L. HODSON.
F. W. WEAVER.
E. T. BOOTON.

At a circuit court held for Page county June 21st, 1904.

The last will and testament of Constance Kearney Vertner, deceased, of Luray, Virginia, with codicil thereto attached, was presented to the court proved by the oaths of Dr. W. L. Hudson, E. T. Booton and F. W. Weaver the subscribing witnesses thereto and ordered to be recorded.

Teste: F. W. WEAVER, *C. C.*

(Endorsed:) Copy of will of Mrs. C. K. Vertner.

48 (19) *Order Making Charles S. Landram and John A. Broaddus, Executors, Parties Defendants.*

Filed July 7, 1904.

This cause coming on to be heard on the petition of the complainant, Gabriella K. Jordan, suggesting the death of the defendant, Constance K. Vertner, and having been submitted to the court, it is this 7th day of July, 1904, adjudged, ordered and decreed that Charles S. Landram and John A. Broaddus, executors of the last will and testament of the said Constance K. Vertner, be and the same hereby are made parties defendant to this suit. And it is further ordered that a subpœna issue out of this court commanding the said

Charles A. Landram and John A. Broaddus, executors, to enter their appearance in this cause.

THOS. H. ANDERSON, *Justice.*

(20) *Final Decree.*

Filed July 8, 1904.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

Equity. No. 22729.

GABRIELLA K. JORDAN, Complainant,
vs.
ELIJAH S. DRAKE ET AL., Defendants.

This cause coming on to be heard on the demurrers of Constance K. Vertner, Lillie K. Vertner and Elijah S. Drake, trustee, defendants to the bill of review, and the same having been argued by counsel and considered by the court, it is this 8th day of July, A. D. 1904, adjudged, ordered and decreed that the said demurrers be, and the same are hereby, overruled. And the said defendants electing not to plead over but to stand on their said demurrers, it is further ordered that the complainant recover costs against the said defendants, except the defendants Elijah S. Drake and Leroy M. Taylor, trustees, to be taxed by the clerk, and that she have execution therefor as at law.

It is further adjudged, ordered and decreed that the decree of this court, heretofore passed on the 27th day of June, A. D. 1900, in equity cause No. 21,422, wherein the defendant Elijah S. Drake, trustee, was named as complainant and the defendants Leroy M. Taylor, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, Thomas K. Vertner and the complainant Gabriella K.
49 Jordan, were named as defendants, which decreed that as to the real estate situated in the District of Columbia, Thomas Kearney died intestate, and that the same descended to his heirs at law, be and the same is hereby modified in so far as it relates to the provisions of said will in regard to the devise of the annuity or legacy to the complainant Gabriella K. Jordan, which provisions are, and are hereby declared to be, valid, and it is further adjudged, ordered and decreed that the said annuity or legacy, for the full term of her natural life, bequeathed to Gabrielle K. Jordan, by the said last will and testament of said Thomas Kearney, is a valid claim or rent-charge, primarily against all rents and revenues collected or derived from lot No. 611 M street N. W., Washington, D. C., and secondarily against his entire estate for any balance of $40 per month, that said rents and revenues may not yield, from the date when the said legacy or annuity became due and payable, for any amount of principal or interest which may be due to said annuitant or legatee thereon.

It is further ordered that the right is hereby reserved to the complainant to apply to this court in the future for any further orders and decrees that may be necessary and proper to carry into effect this decree.

THOS. H. ANDERSON, *Justice.*

From the foregoing decree the defendants Charles S. Landram and John A. Broaddus, executors, Lillie K. Vertner and Elijah S. Drake, trustee, now here in open court note an appeal to the Court of Appeals of the District of Columbia, and pray the court that as to them there may be a severance for the purposes of said appeal, and that the penalty of a bond for costs be fixed by this court.

It is therefore, ordered this 8th day of July, A. D. 1904, that leave be, and the same is hereby, given to the said defendants to sever on appeal to the Court of Appeals from the foregoing decree, and that a bond in the sum of one hundred dolars ($100) for costs be given by the said defendant Elijah S. Drake, trustee, and a bond for one hundred dollars ($100) be given by the other defendants in this cause as required by the rules of this honorable court.

THOS. H. ANDERSON, *Justice.*

(21) *Memorandum.*

July 27, 1904.—Appeal bonds of Elijah S. Drake, trustee, and of Charles S. Landram and John A. Broaddus, executors of C. K. Vertner, deceased, and Lillie K. Vertner filed.

56 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 99, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 22,729, equity, wherein Gabriella K. Jordan is complainant, and Elijah S. Drake, trustee, *et al.* are defendants, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 29th day of September, A. D. 1904.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

In the Court of Appeals of the District of Columbia.

Case No. 1476.

CHARLES S. LANDRAM and Others, Executors, Etc., Appellants,
vs.
GABRIELLA K. JORDAN, Appellee.

Statement of errors for which the appellants prosecute this appeal and of the parts of the record which they think necessary to be printed for the consideration of the questions involved, made in pursuance of clause 5, rule 6, of the Court of Appeals *for* the District of Columbia.

Statement of Errors.

The suit of Gabriella K. Jordan *vs.* Elijah S. Drake, trustee, and others, in the supreme court of the District of Columbia, from the final decree in said suit, in which this appeal has been taken, was instituted for the purpose of reviewing and modifying the decree entered on the 27th day of June, 1900, in the cause of Elijah S. Drake, trustee, *vs.* Leroy M. Taylor, trustee and others, construing the last will and testament of Thomas Kearney, deceased, so far as the same devised or attempted to dispose of lands situated in the District of Columbia, and that the appellee be permitted to remain in the enjoyment of the rents and revenues derived from the real estate in the District of Columbia as provided in the sixth item of the said will, and that the court below erred in overruling the demurrers of the appellants and in entering a final decree on the 8th day of July, 1904, and in not sustaining appellants' demurrers and dismissing the bill of review of appellee.

51 *Parts of the Record which the Appellants Think Necessary to be Printed.*

All of the transcript of record filed herein, except parts which we designate to be omitted, as follows: Omit commencing with the word "certificate" page 34 to and including page 39; head of answer page 40, commencing with the words, "State of Texas" page 42 and page 43; head of answer page 44; answer of Leroy M. Taylor on pages 45 and 46; head of decree page 46; answer of Leroy M. Taylor page 48; head of demurrers pages 50 and 51; heading of opinion page 52; heading of petition page 84 and jurat page 85; heading of order page 91; designation of record on appeal pages 95 to 98 inclusive, and extension of time to file transcript page 99.

To Frank W. Hacket and Charles F. Wilson, attorneys for Gabriella K. Jordan.

GENTLEMEN: In accordance with the clause of said rule we hereby serve you with the copy of the foregoing statement of errors and parts of the record which the appellants think necessary to be printed.

JOHN J. HEMPHILL,
Solicitor for Appellants Landram and Broaddus, Executors of Vertner.

THOMAS P. WOODWARD,
W. MOSBY WILLIAMS,
Solicitors for Appellee Drake, Trustee.

Service of a copy of the foregoing acknowledged this 3d day of October, 1904.

FRANK W. HACKETT.

(Endorsed:) No. 1476. Chas. S. Landram *et al.*, appellants, *vs.* Gabriella K. Jordan. Appellants' assignment of errors and designation of parts of record to be printed. Court of Appeals, District of Columbia. Filed Oct. 4–1904. Henry W. Hodges, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1476. Charles S. Landram *et al.*, executors, appellants, *vs.* Gabriella K. Jordan. Court of Appeals, District of Columbia. Filed Oct. 1, 1904. Henry W. Hodges, clerk.

52 WEDNESDAY, *March 8th, A. D.* 1905.

No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

The argument in the above entitled cause was commenced by Mr. W. Mosby Williams, attorney for the appellants, and was continued by Messrs. Charles F. Wilson and F. W. Hackett, attorneys for the appellee.

TUESDAY, *March 9th, A. D.* 1905.

No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

The argument in the above entitled cause was continued by Mr. F. W. Hackett, attorney for the appellee, and was concluded by Mr. J. J. Hemphill, attorney for the appellants.

On motion, both sides are allowed to file additional authorities herein if so advised.

53 No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased, LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

This is an appeal from a decree of the Supreme Court of the District sustaining a bill of review filed on October 29, 1901, by Gabriella K. Jordan against Elijah S. Drake and Leroy M. Taylor, trustees under the will of Thomas Kearney, deceased; Constance K. Vertner and Lillie K. Vertner, Edmund K. Vertner and Thomas K. Vertner, to review a decree rendered by said court on June 27, 1900, on a bill filed by Elijah S. Drake, trustee, against Leroy M. Taylor, Constance K., Lillie K., Edmund K., Thomas K. Vertner, and Gabriella K. Jordan.

It appears from the bill and exhibits that Thomas Kearney died in San Antonio, Texas, leaving a will dated June 4, 1896, by which he undertook to dispose of a large estate consisting of lands and personal property in the State of Texas, of lands in Virginia, and certain improved and unimproved real estate in the District of Columbia. Executors were appointed for the administration of the estate in Texas, and two trustees, Drake and Taylor, were appointed with general powers, and particularly for the management and control of so much of the estate as was situated in Virginia and the District of Columbia.

The will is a very long and elaborate one, giving full power of possession, control, and so forth, to the trustees, with directions concerning collecting rents, improving property, paying taxes, paying certain sums to testator's daughter and her children, and expressly directs that said possession and powers shall continue in said trustees and their successors until January 1, 1928.

The following items of the will only are of importance in the determination of this case:

"Item 6. I hereby authorize and direct that my said trustees shall during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' street N. W., Washington, D. C., but in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said sum of forty dollars for each and every month; it being my desire that she shall have a regular income of at least forty dollars per month, and that the same be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof.

Item 7 contains directions concerning the lease and disposition of the income of all the real property in the District "except that derived from the house known as No. 611 M street, which shall be paid to my niece as provided in item 6 hereof."

"Item 8. It is my desire and my said trustees are hereby authorized and instructed that, upon the death of my said niece, Gabriella K. Jordan, the fee simple title to the house and lot, No. 611 M street, N. W., Washington, D. C., shall be and in hereby vested in my grand son, Thomas K. Vertner, provided, that should my said niece die before the 1st day of January, 1928, then in that event, said Thomas K. Vertner shall only receive the net rents and revenues derived by my trustees therefrom, and provided further that, should my said niece, die before my grand son shall have attained
54 the age of twenty-two years, then, from the date of the death of my niece, until the said Thomas K. Vertner shall have arrived at the age of twenty-two years the rents and revenues derived from said lot shall be disposed of in the same manner as provided in item 7 hereof in regard to the rents and revenues derived from other property mentioned therein, except the vacant lot on Twentieth street, N. W.

"Item 20. It is my desire and my trustees are hereby instructed to keep all the houses herein entrusted to them insured and in repair; to keep all taxes due or to become due thereon paid, and in case of the destruction or injury of them or any of them, to rebuild or repair them in accordance with the instructions in item 17 hereof.

"Item 21. For fear that there may be some difficulty in construing the different provisions of this [will] relating to the moneys which may come into the hands of the trustees herein named, I desire to say that it is my intention that all the moneys arising from the rents of the Washington, D. C. property, except that which is to go to Gabriella K. Jordon, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Virginia; (2)of (90) ninety dollars per month to my said daughter, Constance K. Vertner during her natural life; (3) for the support, education and maintenance of my said three Vertner grandchildren until Lillie K. Vertner shall have arrived at the age of nineteen years, and until Edmund K. and Thomas K. shall have arrived at the age of twenty-two years respectively."

Leroy M. Taylor declined to accept the trust. Elijah S. Drake accepted and undertook its execution for several years, during which, it is alleged, he paid the sum of $40 per month to Gabriella K. Jordan. On May 15, 1900, Drake filed a bill in the Supreme Court of the District of Columbia against Taylor, who, it was alleged, had declined to accept the trust, Constance K., Lillie K., Edmund K., and Thomas K. Vertner, and Gabriella K. Jordan. The bill sets out the will and alleges as the reason for filing the same, that: "Questions have arisen as to the validity of the provisions in the said will relating to the real estate within the District of Columbia, and your complainant is advised that the said provisions are void because they attempt to create a perpetuity."

The prayer is for the construction of the will.

Constance Vertner answered, alleging the invalidity of the will because it attempted to create a perpetuity. She also alleged that she and her brother, Edmund Kearney, were the sole heirs at law of the testator; that said Edmund Kearney died June 4, 1898, leaving a widow and no children, whereby defendant was his sole heir at law; and that Edmund Kearney left a will which was not so attested as to pass real estate in the District of Columbia. A guardian *ad litem* was appointed for the three infant defendants and filed a formal answer. Gabriella K. Jordan, who lived in New York, filed the following as her answer:

"This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will, and as she is not advised as to the law governing such matters and things therein set forth she prays the court to make such a decree herein as will protect her rights in the premises and to this end admits the matters and things in the said bill of complaint to be true."

Neither she nor Constance Vertner were represented by counsel, and it would seem that it was regarded by the court as a mere friendly proceeding. On June 27, 1900, the decree which is now sought to be reviewed was entered as follows:

"This cause having been calendared, was submitted on the pleadings filed therein and duly considered, it is, by the court, this 27th day of June, 1900, adjudged, ordered, and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered, and decreed that said provisions of said will are deemed and held to be void and of no effect and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs at law."

On October 29, 1901, subpœna on this bill of review was issued to all of the defendants and returned "Not to be found." April 7, 1902, alias subpœna was issued to all and returned "Summoned Leroy M. Taylor personally April 7, 1902, Aulick Palmer, marshal. No copies for other defendants." April 17, 1903, an order of publication was passed for all defendants except Taylor, and proof of publication was filed September 25, 1903.

Constance K. Vertner, Lillie K. Vertner, and Elijah S. Drake entered demurrers on November 5, 1903, on the ground that the bill stated no case for relief. The death of Constance K. Vertner, testate, was suggested on July 7, 1904, and on the same day her executors, Charles S. Landram and John A. Broaddus, were made parties defendant.

On July 8, 1904, the demurrers were overruled, and the defendants electing not to answer, a final decree was entered modifying the decree in the original suit, "in so far as it relates to the provisions of said will in regard to the devise of the annuity or legacy to the complainant Gabriella K. Jordan, which provisions are hereby decreed to be valid; and it is further ordered, adjudged, and decreed that the

said annuity for the full term of her natural life bequeathed to Gabriella K. Jordan, by the said last will and testament of said Thomas Kearney is a valid claim of rent-charge primarily against all rents and revenues collected or derived from lot No. 611 M street N. W., Washington, D. C., and secondarily against his entire estate for any balance of $40 per month that said rents and revenues may not yield, from the date when said legacy or annuity became due and payable, for any amount of principal or interest which may be due to said annuitant or legatee thereon." The decree further reserves the right to the complainant to apply for any further orders and decrees in the future that may be necessary and proper to carry the decree into effect. Landram and Broaddus, executors, Lillie
55 K. Vertner and Elijah S. Drake obtained a severance and perfected an appeal from said decree to this court. No appeal was taken on behalf of the infant defendants, but counsel have appeared on their behalf and made common cause with the appellants.

1. The contention that "the court erred in holding that the substituted service on the absent defendants, except Drake, by publication was valid, and that they were properly before the court for the purpose of making the decree that was entered," is without foundation.

It does not appear in the record that any such question was raised or ruled upon in the trial court. The parties appeared in answer to the publication of notice and made no objection thereto. Irregularity, if any, in obtaining the order of publication was waived by their general appearance.

2. There was no error in overruling the objection, presented on the hearing of the demurrer, that the complainants' right to maintain the bill of review had been lost by laches.

The bill was filed and writs of subpœna regularly issued thereon within the two years from the entry of the decree required by equity rule 88 of the Supreme Court of the District of Columbia. Alias process was also issued before the expiration of the two years, and served upon Taylor, one of the necessary parties in the District. Others were not found. The suit was thus commenced within any construction that may be given to common law rule 6, which applies to suits in equity also, and prosecuted in accordance with the provisions of equity rules 7 and 11. See Huysman *v.* Newspaper Co., 12 App. D. C. 586, 594.

It is true that there was considerable delay in prosecuting the notice by publication to the defendants shown to be non-residents. But there is nothing to show that this was unreasonable or attributable to bad faith. Webb *v.* Pell, 1 Paige Ch. 564; Fairbanks *v.* Farwell, 141 Ill. 354, 368.

Nor does it appear that any prejudice has been caused the defendants by the delay, and there is no question of intervening rights accruing during the interval.

3. The third error that has been assigned is founded on the refusal of the court to sustain the appellants' objection that Mary B. Kearney was a necessary party to the proceeding.

It is essential in a bill of review that all of the parties to the de-

cree and their privies shall be made parties either plaintiff or defendant. Bank *v.* White, 8 Pt. 262, 268. And it appears that this requirement was complied with.

The objection is that Mary B. Kearney, the widow of Edmund Kearney, should have been made a party also because, since the decree annulling the will a right of dower has accrued to her in the lands in the District of Columbia to the extent of the interest of her deceased husband, Edmund Kearney, as one of the heirs at law of Thomas Kearney, deceased.

The objection that she was a necessary party was not raised by plea, answer, or on the face of the demurrer, but by suggestion on the hearing founded solely on the fact recited in the answer of Constance K. Vertner to the original bill filed May 15, 1900, that Edmund Kearney died June 4, 1898, leaving a widow, Mary B. Kearney, and no descendants. No request was then urged that she be made a party to the suit, and the cause proceeded to final decree without her. It is to be remarked also that there is nothing to show that she was living at the time that the bill of review was filed.

But passing by the question whether a party interested in the subject-matter of the original bill and yet omitted therefrom can be considered a necessary party to review the decree rendered thereon, and assuming that Mary B. Kearney is still living, her interest is a contingent one and not so inseparably connected with the claim of the parties to the suit as to make here an indispensable party to this proceeding. Indispensable parties are said to be "persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." Shields *v.* Barrow, 17 How. 130, 139; see, also Story *v.* Livingston, 13 Pet. 359, 375; Barney *v.* Baltimore, 6 Wall. 280, 284; Williams *v.* Bankhead, 19 Wall. 563, 571.

We are of the opinion, therefore, that the objection made on the hearing came too late. Weightman *v.* Critic Co., 4 App. D. C. 136, 153; and cases cited. In one of the cases there cited it was said:

"It ought to be observed here, preliminarily, as a matter of practice, that although an objection for want of proper parties may be taken at the hearing, yet the objection ought not to prevail upon the final hearing upon appeal, except in very strong cases, and when the court perceives that a necessary and indispensable party is wanting. The objection should be taken at an earlier stage in the proceeding, by which great delay and expense would be avoided. The general rule as to parties undoubtedly is that when a bill is brought for relief all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there be a complete and final decree between all parties interested. But this is a rule established for the convenient administration of justice, and is subject to many exceptions, and is more or less a matter of discretion in the court, and ought to be restricted to parties whose interest is

involved in the issue and to be affected by the decree. The relief granted will always be modified so as not to affect the interests of others." Mechanics Bank *v.* Seton, 1 Pet. 299, 306.

Whatever interest Mary B. Kearney may have is not concluded by the decree rendered herein, and may be asserted by her hereafter if desired.

4. Having disposed of the foregoing preliminary questions, we come now to the consideration of the merits of the case as presented in the bill. In this we do not find it necessary, or that it would serve any useful purpose, to accept the invitation of counsel and enter upon the consideration of the question whether the general trusts created by the will of Thomas Kearney, as decreed on the original bill, are in fact void because in violation of the rule against
56 perpetuities. In the view that we have taken of the complainant's case, she has no direct interest in that question which renders its determination necessary, or even proper, under the circumstances. All of the parties whose interests were directly and materially affected by that part of the decree have not only acquiesced in it, but have appeared in this court also in its support.

By the terms of her bill the complainant limits her right of review to so much of that decree only as undertakes to annul the trust for her benefit in lot 611 M street N. W., and in so far as it may affect her contingent right to a monthly income of $40 during life, to be made up from the revenues of other property in the District of Columbia, in the event that the revenues of said lot shall fall short of realizing that sum.

Upon the assumption, then, of the correctness of the original decree, in so far as it declared void the several trusts of the will for the benefit of testator's daughter and grandchildren because violative of the rule against perpetuities, the contention is that the trust in favor of Gabriella K. Jordan, contained in item 6 of the will, necessarily fails with the others.

This result depends upon the inseparability of the special intention expressed in item 6 from the general intention expressed throughout in respect of the disposition of the great body of a large estate.

Undoubtedly, if it shall appear that the intention to create a trust for the life of Gabriella K. Jordan is so involved in the general scheme of the whole will as to be dependent upon it, and not capable of enforcement without doing violence to the general intention of the testator, it must fail along with the remainder of the will. Fosdick *v.* Fosdick, 6 Allen, 41, 48; Thorndike *v.* Loring, 15 Gray, 391, 398; Lovering *v.* Worthington, 106 Mass. 86, 88; Amory *v.* Lord, 9 N. Y. 403; Knox *v.* Jones, 47 N. Y. 389, 398.

On the other hand, a trust for general purposes may be void because unauthorized by law without necessarily rendering void a particular trust in the same will made to subserve another purpose that is authorized. Savage *v.* Burnham, 17 N. Y. 561, 576. And it is a rule, founded in reason as well as supported by authority, that if under settled principles of law effect can not be given to an entire will or to certain entire provisions thereof, any provision may never-

theless be given effect which is conformable to those principles, and which can be separated from the residue without doing violence to the testator's general intention. In other words, where an estate has been vested in trustees upon several independent trusts, one of which is legal though others may not be, the estate of the trustees will be upheld to the extent necessary to enable them to execute the valid trust though avoided as to the others. Oxley *v.* Lane, 35 N. Y. 340, 349; Van Schuyver *v.* Mulford, 59 N. Y. 426, 432; Tiers *v.* Tiers, 98 N. Y. 568, 572; Burnes *v.* Allen, 89 Hun, 552, 558; S. C. affirmed, 154 N. Y. 741; Loring *v.* Blake, 98 Mass. 253, 262; Lovering *v.* Worthington, 106 Mass. 86, 88; Graham *v.* Whittridge (Md. 1904), 57 Atl. Rep. 609.

Tested by these principles, we are of the opinion that the trust created for the benefit of Gabriella K. Jordan in item 6 of the will of Thomas Kearney is a valid one and may be executed without regard to the failure of the remaining trusts for the benefit of other objects of the testator's bounty, and that it was manifest error to declare that provision of the will void along with the others, as was done in the original decree. In that provision (item 6) the testator expresses a particular and independent intention to provide an income for Gabriella K. Jordan during her life and expressly separates lot No. 611 M street N. W. from the residue of his estate in order to effect that intention. This intention to separate that lot from the rest of the estate is further shown in the special exceptions contained in items 7 and 20, before mentioned. Moreover, item 8 provides that upon the death of the life beneficiary, Gabriella K. Jordan, "the fee simple title to the house and lot No. 611 M street N. W. shall be and is hereby vested in my grandson, Thomas K. Vertner." This is followed by the words "provided my said niece die before the 1st day of January, 1928, then and in that event said Thomas K. Vertner shall only receive the net rents and revenues derived by my trustees therefrom, and provided further, that should my niece die before my said grandson shall have attained the age of twenty-two years, then from the date of the death of my niece until the said Thomas K. Vertner shall have arrived at the age of twenty-two years the rents and revenues derived from said lot shall be disposed of in the same manner in item 7 hereof in regard to the rents and revenues derived from other property mentioned therein," etc.

The first clause of item 8, before quoted, vests a remainder in fee in said lot in the grandson Thomas K. Vertner, to come into possession and enjoyment upon the termination of the trust for life for the benefit of Gabrielle K. Jordan created by item 6. Richardson *v.* Penicks, 1 App. D. C. 261, 264: and cases cited. Conceding, as in the case of the general trusts, that the attempt in the foregoing provisos to postpone the enjoyment of the estate of the grandson may be in contravention of the rule against perpetuities, the result is the avoidance of their restraints without affecting the devise of the remainder. Neither the devise of the equitable life estate of the niece nor the remainder in fee can be rendered void by an unlawful attempt to postpone the enjoyment or restrain the alienation of the fee. Leonard *v.* Burr, 18 N. Y. 96, 106; Goldsborough *v.* Martin,

41 Md. 488, 502, 503; Lovering *v.* Worthington, 106 Mass. 86, 88; 2 Perry on Trusts, sec. 622; Saunders *v.* Vautier, 4 Beav. 115; Curtis *v.* Luken, 5 Beav. 147, 155. Our conclusion is, therefore, that the provisions of the will relating to Gabriella K. Jordan are separable from and independent of the others, and should have been upheld in the original decree.

The learned justice presiding in the equity court was right in the decree rendered by him modifying the original decree to that extent. If it shall become necessary, the court may, under its general equity jurisdiction, appoint another trustee, for the purpose of giving effect to the execution of the trust, and there is nothing to prevent the complainant from pursuing some appropriate proceeding
57 to enforce the payment of the arrears of the revenues to which she is entitled.

5. We have also been asked, on behalf of the appellee, to declar the original decree invalid on the ground of a want of jurisdictio of the court to entertain the bill filed by the trustee for the purpose of annulling the entire will under the pretense of seeking a construction of the trusts created thereby. The suit was, indeed, an extraordinary one, and the manner in which it was prosecuted to a final decree vacating each and all of the trusts would seem to warrant the inference, to some extent, that such was the real object sought. But for the reason given for not passing upon the validity of the will as a whole, we regard it as unimportant to determine any other question than that in which the interests of the complainant are necessarily involved.

For the reasons heretofore given the decree will be affirmed, with costs, and it is so ordered.

Affirmed.

58 TUESDAY, *April 4th, A. D.* 1905.

No. 1476. April Term, 1905.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased; LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed with costs.

Per MR. CHIEF JUSTICE SHEPARD.

April 4, 1905.

THURSDAY, *April 13th, A. D.* 1905.

No. 1476. April Term, 1905.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased; LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

On motion of Mr. J. J. Hemphill, of counsel for the appellants in the above entitled cause, It is by the Court this day ordered that said appellants Charles S. Landram and John A. Broaddus as Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, be and they are hereby allowed to sever from their co-appellant Elijah S. Drake, Trustee, upon their appeal to the Supreme Court of the United States from the decree of this Court passed herein on the 4th day of April A. D. 1905.

Per MR. CHIEF JUSTICE SHEPARD.

April 13, 1905.

59 No. 1476.

CHARLES S. LANDRAM and JOHN A. BROADDUS, Executors of Constance K. Vertner, Deceased; LILLIE K. VERTNER and ELIJAH S. DRAKE, Trustee, Appellants,

vs.

GABRIELLA K. JORDAN.

On motion of Mr. J. J. Hemphill, of Counsel for the appellants in the above entitled cause, and it appearing that the amount in controversy exceeds the sum of $5000, It is ordered by the Court that the appellants Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, be allowed an appeal to the Supreme Court of the United States, and the bond for costs is fixed at the sum of three hundred dollars, and the bond to act as supersedeas is fixed at the sum of twenty-five hundred dollars.

60 *Bond on Appeal.*

Know all men by these presents, That we, Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner (now Lillie K. Vertner Jones), as principals and The United States Fidelity & Guaranty Company and Edmund K. Vertner, as sureties, are held and firmly bound unto Gabriella K. Jordan in the full and just sum of Two thousand and five hundred ($2,500) dollars, to be paid the said Gabriella K. Jordan certain attorney, executor, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of October, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, Lillie K. Vertner (now Lillie K. Vertner Jones), and Elijah S. Drake, trustee a decree was rendered against the said Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, Lillie K. Vertner and the said Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner (now Lillie K. Vertner Jones) having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Gabriella K. Jordan citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner (now Lillie K. Jones) shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

CHAS. S. LANDRAM, [SEAL.]
Ex'or of Mrs. Constance K. Vertner, dec'd.
JOHN A. BROADDUS, [SEAL.]
Ex'or of Mrs. Constance K. Vertner, dec'd.
LILLIE K. VERTNER JONES. [SEAL.]
EDMUND K. VERTNER. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
By J. S. SWORMSTEDT, *Attorney in Fact.*

[Seal of United States Fidelity & Guaranty Co.]

As to Chas. S. Landram and John A. Broaddus, Exers. of Mrs. Constance K. Vertner, dec'd.

Sealed and delivered in presence of

C. S. GRAYSON,
C. T. HOLTZMAN,
As to Lillie K. Vertner Jones.
JAMES H. TRAYNOR,
As to Edmund K. Vertner.
WM. S. HUDSON,
Witness as to the United States Fidelity & Guaranty Company.
ANNIE C. SCHUERMANN.

Approved by
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1476. Charles S. Landram *et al.*, Appellants, *vs.* Gabriella K. Jordan. Supersedeas bond on appeal to Supreme Court of the United States. Court of Appeals District of Columbia. Filed Dec. 12, 1905. Henry W. Hodges, Clerk.

61 UNITED STATES OF AMERICA, *ss:*

To Gabriella K. Jordan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, Lillie K. Vertner, Appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 13th day of December, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service of this citation accepted and acknowledged this 14- day of Dec'r 1905.

FRANK W. HACKETT,
CHARLES F. WILSON,
Attorneys for Gabriella K. Jordan, Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Dec. 15, 1905. Henry W. Hodges, Clerk.

62 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 61, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased; Lillie K. Vertner, and Elijah S. Drake, Trustee, Appellants, *vs.* Gabriella K. Jordan, No. 1476, October Term, 1905, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 22nd day of December, A. D. 1905.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,042. District of Columbia, Court of Appeals. Term No. 540. Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, Appellants, *vs.* Gabriella K. Jordan, Filed January 10th, 1906. File No. 20,042.

FILE COPY.

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JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

CHARLES S. LANDRAM AND JOHN A. BROADDUS, EXECUTORS, *et al.*, APPELLANTS,
vs.
GABRIELLA K. JORDAN, APPELLEE.

No. 179.

BRIEF FOR APPELLANTS.

JOHN J. HEMPHILL,
Attorney for Appellants.

JAMES HEMPHILL,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

CHARLES S. LANDRAM AND JOHN A. BROADDUS, EXECUTORS, *et al.*, APPELLANTS,
vs.
GABRIELLA K. JORDAN, APPELLEE. } No. 179.

BRIEF FOR APPELLANTS.

STATEMENT OF FACTS.

Doctor Thomas Kearney, of Texas, executed his last will June 4, 1896, and died July 5, 1896, leaving as his heirs at law two children, to-wit: Edmund Kearney, of Mississippi, and Constance Kearney Vertner, of Virginia, who was a widow with three children, all minors, viz: Lillie K., Edmund K. and Thomas K., all these are now of age.

The testator's son, Edmund Kearney, died June 4, 1898, leaving a widow, but no children. His sole heir at law was Mrs. Vertner his sister, who died at Luray, Virginia, June 6, 1904, during the progress of this litigation. Her executors have been made parties to the record.

Doctor Kearney died possessed of real estate in Texas,

Virginia and the District of Columbia. In item 2 of his will, he describes his Virginia property, and in item 3 he specifically names and describes each piece of his real state in Washington, D. C., including by name No. 611 M Street, N. W.

By item 5, the testator devises all of his Washington real estate, including 611 M Street, to Doctor Leroy M. Taylor and E. S. Drake, in trust, to hold the same until January 1st, 1928, and by other items directs his trustees to pay the income from the trust property to certain beneficiaries.

Doctor Taylor declined to accept the trust, and Judge Drake qualified and has acted as sole trustee.

The will having placed the property in Washington in the hands of trustees for a fixed number of years, the question arose whether the will violated the law relating to perpetuities in the District of Columbia, and Judge Drake, the trustee, being advised that the will, in this regard, was contrary to the law of the District, and desiring to obey the law, filed his bill of complaint in the Supreme Court of the District, alleging that questions had arisen as to the validity of the provisions of Doctor Kearney's will relating to the real estate in the District of Columbia, and that he had been advised that said provisions were void because they attempted to create a perpetuity. He prayed the Court:

> 3. "That by a decree of this Honorable Court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised.
> 4. That he shall have such other and further relief as the nature of the case shall require." (R. 8.)

The defendants to this bill were Leroy M. Taylor, Trustee, Constance K. Vertner, Lillie K. Vertner, Edmund K. Vertner, Thomas K. Vertner and Gabriella K. Jordan.

With this bill of complaint a copy of the testator's will was filed as an exhibit. Mrs. Constance K. Vertner answered the bill alleging that she had been advised that the last will of her father, Thomas Kearney, was void in so far as it undertook to dispose of real estate in the District of Columbia, because it created an estate contrary to the law forbidding perpetuities, and she joined in the prayer to the Court for a *proper construction of the will,* on that point. (R. 22.) Miss Jordan, this Appelle, answered, stating that she was not advised as to the law governing such matters as were set forth in the bill and prayed the Court to make such decree as would protect her rights in the premises, and admitted the matters and things in said bill of complaint to be true. (R. 23.) On May 23rd, 1900, the case was calendared and heard, and after a month's consideration Mr. Justice Barnard on June 27, 1900, filed a decree as follows:

> "This cause having been calendared, was submitted on the pleadings filed therein and duly considered, it is, by the Court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate, and the same descended to his heirs at law." (R. 24.)

From this decree no appeal was taken by either party. On October 29, 1901 this Appellee filed a bill of review

in the Supreme Court of the District, alleging that she had been injured by said decree, praying that the same be reviewed and set aside and no further proceedings be had thereon, and that she "be permitted to remain in the undisturbed enjoyment of the rents and revenues derived from the real estate situated in the District of Columbia as provided in the 6th item of the said will." (R. 6.) Drake, Trustee, with Constance K. Vertner and Lillie K. Vertner, the latter then being of age, demurred to this bill. (R. 25-26.) It was heard on demurrer before Justice Anderson who refused to set aside the decree of Justice Barnard, but on the contrary affirmed the same, excepting therefrom the allowance of forty dollars per month given by the 6th item of the will to the Appellee in this case. (R. 33-4-5.)

Mrs. Vertner having died, her executors were made parties to the record and they with Lillie K. Vertner and Drake, trustee, appealed to the Court of Appeals. (R. 47.)

Miss Jordan did not appeal. That Court, April 4, 1905, affirmed the decree of the Supreme Court with costs. (R. 57.) Judge Drake did not appeal from the decree of the Court of Appeals but the executors of Mrs. Vertner with Lillie K. Vertner, having been allowed to sever, by order of Court, of April 13, 1905, appealed to this Court, and the appeal was granted in open Court (R. 58).

ASSIGNMENT OF ERRORS.

1. The Court below erred in overruling Appellants' demurrer.

2. The Court erred in not sustaining Appellant's demurrer, and in not dismissing the bill of review.

3. The Court erred in holding that the provisions, in favor of Appellee in the will of Thomas Kearney, are valid.

4. The Court erred in holding that the provisions of said will in favor of the Appellee are valid, and can be en-

forced, while the other provisions of the same will, relating to property in the District of Columbia, are void and can not be enforced; and that the provisions in favor of the Appellee can be wholly separated from the other provisions of the said will and can be enforced independently of the other provisions relating to said property without injury to other parties named as beneficiaries in said will.

5. The Court erred in not dismissing the bill of review for want of proper parties, and in awarding relief to Appellee when the record disclosed that Mary B. Kearney, the widow of Edmund Kearney, the deceased son of Thomas Kearney, had not been made a party to the suit.

POINTS AND AUTHORITIES.

There are three principal questions in the case:

First: Did the testator violate the law in this jurisdiction relating to perpetuities, when he placed the title to his Washington property in the hands of trustees until 1928, without power of alienation?

Second: If the trust thus created is void, are the provisions of the will also void which dispose of the income of this trust; or can the claim of this Appellee for a part of the income from the trust property be separated from the trust and from the other items of the will disposing of the balance of the trust income, and be sustained as wholly separate from and independent of the other provisions of the instrument, and will this be the will of the testator?

Third: Have the necessary parties been brought into Court?

I.

As to the first question: It seems to be clear that the testator violated the law of this jurisdiction when he placed the title to his Washington real estate in the hands of

trustees, without power of alienation until 1928. After separately enumerating in item 3 of his will each piece of this property, he passes the title to the Trustees in the following language, in Item 5 (R. 9).

> "Having full faith in the integrity and business capacity of Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake of Port Gibson, Mississippi, I hereby appoint them and *their successors*, as hereinafter provided, *trustees* for the purpose of managing all the real property in item 2 and 3 of this will, from and after my death, *continuously* until the *year 1928*, subject, however, to the conditions and limitations hereinafter imposed, and *devise* to them, the said Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake, of Port Gibson, Mississippi, and their successors, *all and singular*, the property mentioned in item 2 and 3 hereof, in trust for the uses and purposes and under the conditions hereinafter mentioned. Said trust to be continued in them and their successors until *the first of January, 1928*; said trustees and their successors to have full, free and *absolute possession and control of the same until the date last above mentioned*, with full power and authority to let and lease the same for said period, and to collect all rents and revenues accruing therefrom, with full power and authority to take all necessary steps either in or out of Court to collect said rents and revenues, and to protect and preserve said property."

Does this violate the law relating to perpetuities?

The law relating to perpetuities in this jurisdiction has been defined by this Court to be:

> "A limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with a fraction of a year added for the term of gestation in cases of posthumous birth."
>
> Ould vs. Washington Hospital, 95 U. S. 303-312.

This has been embodied in the Code of this District, passed since the execution of testator's will, in the following language:

> "Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter."

It is the same in other jurisdictions.

"The rule against perpetuities, by which every devise or bequest is void which may by possibility not take effect within a life or lives in being and twenty-one years after."

Jones vs. Habersham, 107 U. S. 174-176.
McArthur vs. Scott, 113 U. S. 340-381-382.

The rule applies to the possibility of non-vesting.

Proprietors vs. Grant, 3 Gry. 142-153-155.
1 Perry on Trusts, Section 380-381.
Sears vs. Putnam, 102 Mass. 5.
Barnum vs. Barnum, 26 Md. 119.

It applies to equitable estates and trusts.

1 Perry on Trust, Section 382.
Bigelow vs. Cady, 171 Ill. 209.
Andrews vs. Lincoln, 95 Me. 541.

If the suspension be for a fixed period without reference to a life or lives, such period can not exceed twenty-one years flat.

"Where the original rule against perpetuity is in force,

* * *a devise *to vest* at the end of a *fixed period of time*, without regard to lives in being, is void under the rule, where the time fixed *exceeds twenty-one years*, even though the aggregate term will probably be less than a life in being and twenty-one years."

Page on Wills, Sec. 632.

"Whenever lives in being do not form part of the time of suspension or postponement, the only period under the rule against perpetuities is twenty-one years absolute."

Andrews vs. Lincoln, 95 Me. 541, 50 A. 899, 900.

"Where the accumulation is for *a gross number of years*, the rule against perpetuities *prohibits more than twenty-one years.*"

Kimball vs. Crocker, 53 Me. 263.

Under the New York Statute, limiting the suspension to *two lives in being*, as well as under similar statutes of other states, it is held that if a *gross or absolute term of years* instead of lives is taken as the measure of suspension, the statute is violated however short the term may be.

Beekman vs. Bonsor, 23 N. Y. 298, 316.

Rice vs. Barrett, 102 N. Y. 161, 6 N. E. 898.

Cruikshank vs. Home for Friendless, 113 N. Y. 337, 20 N. E. 64.

In re Walkerley's Estate, 108 Cal. 627, 41 P. 772, 777.

DeWalf vs. Lawson, 61 Wis. 473, 21 N. W. 615, 617.

Rule one of law and not of construction.

"The rule against perpetuities is not a rule of construction, but a peremtory command of law. It is not like a rule of construction, a test more or less artificial to determine intention. Its object is to *defeat intention.* Therefore every provision in a will or settlement is to be construed as if the rule did not exist, and then to the provisions so construed, the rule is to be *remorselessly applied.*"

Gray on Perpetuities, Sec. 629.

"The rule which has always been applied to cases of remoteness is this: You do not import the law of remoteness into the construction of the instrument by which you investigate the *expressed intention of the testator*. You take his words and endeavor to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole *intention* expressed by the words *could* lawfully take effect."

Pearles vs. Mosely, 5 App. Cas. (House of Lords) 714-719. Per Lord Selborne, Lord Chancellor.

"It is against the settled rule of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found *to be the testator's wishes, must be taken to be his wishes*, and *if these wishes offend against the rule*, the gifts would fail, and must fail accordingly."

Heasman vs. Pearse, L. R. 7 Ch. App., 275, 283.

CASES WHERE PROVISIONS SIMILAR TO THOSE IN SUIT WERE HELD TO VIOLATE THE RULE.

(a) Fidelity Trust Company, etc., vs. Lloyd, (Ky) 78 S. W. p. 898.

Held: A will providing that testator's real estate shall not be sold or encumbered for forty years after his death (the income thereof to be meanwhile paid to his children and grandchildren), and then shall be divided among those who shall then be the heirs of the testator's body, though the restriction is to be removed in case the land shall be taken into the limits of a certain city, is void as in violation of the rule against perpetuities.

The Court said:

"In our opinion, the trust attempted to be created by this will is obnoxious to the rule against perpetuities and

to section 2360 of the Kentucky Statutes of 1903, for the reason that it unlawfully suspends the power of alienation for a longer period than during the continuance of a life or lives in being at the creation of the estate and twenty-one years and ten months thereafter. Testator plainly provides that his real estate shall remain in the hands of his executors for the gross period of forty years without reference to any life or lives in being. The law permits the vesting of an estate and the power of alienation to be postponed for a life or lives in being and twenty-one years and ten months thereafter; but if the vesting of the estate or interest is postponed or the power of alienation suspended for a longer period, it is unlawful, and the devise or grant is void."

(b) *Andrews vs. Lincoln, 95 Me., 541, 50 A. 898.*

A testator devised all his estate to trustees to hold, manage, sell, invest, and accumulate the proceeds, etc., for thirty years, and with discretion to pay from income or principal of the trust fund such sums as to them seemed fit, for the maintenance, etc. of testator's grandchildren and of his son and his son's wife. The will then proceeded as follows:

"At the expiration of said thirty years, the whole of said fund or estate * * * * *shall become the property of* my said two grandchildren, in equal shares," and in case the grandchildren should be then deceased, it should vest in certain other persons.

Held: That the attempted trust offends the rule against perpetuities.

The Court said:

"In this case, lives in being do not form a part of the period of postponement. *It is a gross term of thirty years.* Whenever lives in being do not form part of the time of suspension or postponement, the only period under the rule against perpetuities is twenty-one years absolute * *. If the estate was then to "become" the grandchildren's, and that is the language of the will, we think it was not vested in them before * * *. We hold therefore that this attempted

trust offends the rule against perpetuities, in that it postpones the vesting of the equitable interest of the cestuis que trustent beyond the period limited."

(c) *Coleman vs. Coleman, 65 S. W. (Ky.) 832.*

A will provided that the property of the testator should be held in trust by his widow for twenty-five years after his death, she to receive the income thereof for the support of herself and children, and that during the twenty-five years none of the children should have power to sell or convey his interest. At the expiration of the twenty-five years the estate was to be divided among the children and the heirs of those dead before that time.

Held: That the will was void as an attempt to create a perpetuity.

Observe that the Kentucky Statute against perpetuites (which is practically the same as that now in force in the District of Columbia) is held by the Court, in the case just cited, to be "simply declaratory of the common law."

(d) *Phillips vs. Heldt, (Ind.) 71 N. E. 320.*

A will directed that certain real property should be held and controlled by the executor, in trust, for thirty years from the testatrix's death, and at the expiration of that time, should be divided among certain persons or their heirs.

Held: That the provision contravened the Statute of the state against restraints on alienation and *the rule against perpetuities.*

The Court said:

"The suspension of the power of alienation in said will is not made to depend upon a life or any number of lives in being, but is fixed for a term of years. The suspension for a term of years, however short, is void."

(This case was decided under a Statute similar to the N. Y. Statute. See note on p. 4).

(e) *Speakman vs. Speakman, 8 Hare, 180.*

The testator directed the surplus income of his estate to be applied for the benefit of his children, and at the end of fifty years from his death that his estate should be divided among them or their heirs in their stead, and in case of the death of any child without issue, his share to go to the survivors or their heirs.

Held: That the limitation of the property at the expiration of the fifty years was too remote.

The Court (Sir James Wigram, V. C.) uses this language:

"The true way of reasoning upon a will like this is first, to ascertain what it is that the will directs during the period of fifty years, without reference to the question whether the gift, at the expiration of the term is good or bad; and if the direction during the period of fifty years, can be thus ascertained, the Court is not at liberty to alter the construction of the will, for the purpose of supporting the ultimate limitation at the expiration of the fifty years; that would be to make a new will for the testator, only because the rules against perpetuities prevent his will from being carried into effect."

(f) *Kimball vs. Crocker, 53 Me., 263.*

Bequest of $40,000 to trustees, to be kept invested and the interest thereon accumulated for twenty-five years, at the end of which period the fund was to go to testator's two grand-sons, and in case of their death without issue, before the expiration of the twenty-five years, then to testator's brothers or their lineal descendants.

Held: That the trust for accumulation was void, as being for a gross term of more than twenty-one years.

The Court said:

"When the accumulation is for *a gross number of years*, the rule against perpetuities *prohibits more than twenty-one years*. Whenever lives in being do not form part of the time of suspension or postponement, the only period

under the rule against perpetuities is twenty-one years absolute. * * * The trust for accumulation is void."

Not only do these authorities show clearly that the testator has violated the law relating to perpetuities, but every Judge that has passed upon the will in this case, has decreed that this provision of the will violated the law of this jurisdiction and is therefore void; and no appeal by any party to the case has been taken from that portion of either of the decrees.

Mr. Justice Barnard held:

> "That it was absolutely void and that Thomas Kearney died intestate as to this property and the same descended to his heirs at law." (R. 24.)

Mr. Justice Andreson held:

> "And therefore, as no power of sale is vested in the trustees, and the ultimate beneficiaries take no title until 1928, these devises are clearly void under the rule relating to perpetuities." (R. 33.)

Further he held:

> "In so far, therefore, as the will of the testator undertakes to vest the fee simple title to his Washington real estate in the beneficiaries therein named, his will is void to that extent at least, and the Court was clearly right in so holding." (R. 33-34.)

The Court of Appeals affirmed the decree of the Supreme Court quoted, with costs. (R. 57).

It is therefore settled that the will of the testator in so far as it attempts to create a trust covering his Washington realty is null and void.

II.

Second: If the trust attempted to be created by the testator covering the Washington property is void, does the provision for the Appellee fall with it?

Under the decisions of the Courts, the answer to this question depends upon the further inquiries as to whether the attempted trust embodies the main scheme or plan of the testator as to his Washington property; and whether the forty dollars per month which the trustees are directed to pay to Appellee, out of the income from the trust property, is dependent upon or connected with his general plan or scheme. The decisions of the Courts establishing this doctrine are clear upon this point. I cite the following:

Knox vs. Jones, 47 *N. Y.*, 393, 398.

In this case the rule for determining whether the invalidity of a trust affects other portions of a will is stated thus:

"A void trust which is separable from other valid trusts may be cut off when the trust thus defeated is *independent* of the other dispositions of the will, and *subordinate* to them, and not an *essential part* of the *general scheme*."

In our case, the main purpose of the will was to tie up the Washington property until 1928; the void trust therefore, is not only an essential part of the general scheme, but it is the general scheme itself. So far from being subordinate to the provision for Miss Jordan, that provision is wholly dependent upon and subordinate to the void trust.

Pitzel vs. Schneider, 216 Ill. 17, 74, N. E. 779.

An estate was devised in trust for the following purposes:

1. To manage, control, invest and collect the rents and profits thereof.

2. Out of such rents, etc., to pay one thousand dollars per year to the testator's widow for life and the balance of the income to his son and daughter for life, with directions as to the disposal thereof in case of the death of any of said persons.

3. After the death of the children, to divide the estate among the grandchildren that should attain the age of twenty-one, if a female, and twenty-five if a male.

Held: That that portion of the trust which directed a division of the estate as indicated under clause 3 supra, was void as a perpetuity and that its invalidity vitiated the other portions of the trust so that the whole was void.

The Court said:

"The trust attempted to be created by the will is an *entire and complete scheme* for the control and disposition of the property of the testator * * * The trust provisions cannot be held in part valid, and part void, without defeating, in part, the intention of the testator, hence they must be held invalid as a whole."

Lawrence vs. Smith, 163 Ill. 149, 45 N. E. 259.

Testator bequeathed his property in trust to pay to his daughter an annuity of six hundred dollars, and on his death to her children an annuity of three hundred dollars each, until they arrived at the age of twenty-five years, at which time there should be paid to each child, as he arrived at that age, ten thousand dollars. If, at the death of the daughter, any of her children were of the age of twenty-five years, the said sum should be paid in lieu of the annuity. At the termination of the trust as to all beneficiaries and remaindermen, the property should be divided among the grandchildren then living.

Held:

1. That the direction for the division of the estate after the termination of the trust as to all the beneficiaries and remaindermen, and the provision for the children of the testator's daughters who might be born after his death violated the rule against perpetuities.

2. That the trusts being connected, so as to constitute one scheme, cannot be held valid as *to the annuities provided for the benefit of the daughter and children living at the time of testator's death.*

The Court said:

"It clearly appears that the trust created by the testator

was one entire scheme, upon which the execution in the main of the various provisions of his will was made to depend. Aside from the books, pictures, etc., bequeathed to the aforesaid three daughters by the seventh clause of the will, the validity of which is unquestioned, *there is no bequest made directly to any beneficiary*, but *directions only are given to the trustee to make certain payments out of the trust estate*,—some out of the principal, others out of the income * * *. We see no way by which a division of the trust created by this will can be made, and part held valid, and the rest invalid, without doing violence to the intention of the testator. It is all one entire scheme, and *although the trust is an instrument to effect the beneficial purpose of the testator, it is made the most prominent feature of the will.*"

Harris vs. Clark, 7 N. Y. 242, 257.

A trust to invest $30,000, and out of the income thereof to pay *$700 a year* to testator's sister, Nancy Harris, or in case of the sister's death, to his niece, the residue of the income to be accumulated until final distribution. At the death of the niece the principal and accumulations to go to her issue if she left any, and if the sister was then dead; and in case of the death of both sister and niece without issue then to certain other persons.

Held: That the trust for accumulation was void and that as the trust was *entire*, the annuity to the sister and niece failed also.

The Court said:

"As this trust is entire, *the annuity of $700 to Mrs. Harris and her daughter cannot be sustained.* The testator has directed that $30,000 should be invested, and that the whole income should be disposed of by the trustees in the manner prescribed. The trust to invest is not divisible, and being void in part, the whole is void."

Barnum vs. Barnum 26 Md. 19, 90 AM. Dec. 88.

A testator made the following provisions with regard to

certain hotel property, consisting of the hotel proper and an office part.

1. The entire property was devised to trustees in trust to lease the same, collect rents, etc., and out of the rents of the hotel part to pay certain sums annually to his wife and to his children and their heirs. The period during which the leasing was to take place and the trust to continue was to be so long as his children or any descendants of any of them should live.

2. The rents of *certain specific rooms* of the office part of the building *he devised* to *certain named children* and grandchildren and their heirs respectively.

Held: That *the trusts* to lease, etc., were void and that *the legacies of the rents of the rooms named were also void, as springing out of the trusts.*

The Court said:

"The trust being void in toto, we regard *the legacies springing out of them to be void also.* The power to lease being void, *the right to share in the distribution of the rents,* the fruits of the exercise of the power, must necessarily fail."

Coster vs. Lorillard, 14 Wend. (N. Y.) 265.

Devise to trustees in trust:

1. To pay annuities to certain of testators relations for life or until the death of all his nephews and nieces.

2. To pay the residue of the income to said nephews and nieces during their lives and to the survivor or survivors of them equally.

3. After the death of all said nephews and nieces, the estate to be divided among the children of such of them as might be then dead, per stirpes.

By a codicil, the testator gave certain legacies to his relations in addition to the provisions made for them by the trusts above set out.

Held: That the second and third trusts were void as

illegally suspending alienation, and that the annuities given by the first trust as well as the legacies given by the codicil though good in themselves fell with the illegal trusts.

Several of the judges delivered opinions but that of Senator Young best states the grounds of decision. He said:

"The trusts in the will being thus void in their creation, what result will follow with respect to the legacies and annuities which the testator, under what he assumed to be valid trusts, bestowed upon his relations? His main object was to secure his vast estate from partition or alienation for twelve lives, in order to give it to his grand-nephews and nieces who should then be living, and the decendants of such as should be dead; and in the meantime to distribute the annual rents and profits of his estate among his twelve nephews and nieces and the survivors of them. These prominent and controlling objects of the testator cannot be carried into effect. The great plan is destroyed and *to maintain the subordinate parts would be to make for him a new will * * The main intent and object of the will having failed,* the provisions for the relatives of the testator founded upon that intent, must fail also * * * * To substitute *portions* of a will for the *whole* where these portions are connected with the general intent of a testator, and which general intent is unauthorized by law, would lead to *dangerous results.* The will in all such cases would be changed into an instrument very different from what the testator designed. It would not be his will but the will of the Court."

See also:

In re Christie et al., 133 N. Y. 473, 31 N. E. 515.
Amory vs. Lord, 9 N. Y. 403.
28 Am. & Eng. Encyc. of Law, (2nd Ed.) 866,867.

What then is the general scheme of the testator with reference to his Washington real estate?

Evidently his plan was to tie it up until 1928, by which time he doubtless anticipated it would be greatly enhanced in value; and in the meantime he directs that the fruits

of the trust, coming to the trustees as rent, shall be paid partly to his daughter and her children, and partly to the Appellee.

By item 5 of his will, the testator explicitly and completely transfers all his Washington real estate to two trustees to be held: *"continuously* until the *year 1928;"* * * * * * *"said trust to be *continued* in them and their successors until the *1st day of January 1928."* (R. 9.)

To avoid any possible misunderstanding of his purpose, he inserts in item 8, which vests 611 M Street in one grandson, after the death of the Appellee, a proviso, that should his said niece die before the *1st day of January, 1928,* then his said nephew should only receive the rents and revenues until that date (R. 11.)

So in item 19, any property in the City of Washington not specifically disposed of by his will is devised to his trustees, provided, that if it be real estate, it shall be held *until the year 1928*; and again in the same item he declares that his grandchildren shall not come into possession and control of said property until the *year 1928.* (R. 19.)

So also by item 21 he provides that on the *1st day of January, 1928,* the title and ownership of the Washington property shall be vested in his grandchildren. (R. 20.)

Whenever the title of any of the real estate in this jurisdiction is mentioned by the testator, there is always a reiteration of his fixed purpose that the title shall not pass out of the trustees until *1928.*

Provision is made for the sale of the real estate in Virginia and in Texas, in the discretion of the parties named in the will. (R. 10-13.) As to the Washington real estate, no discretion is given to or to be exercised by any one. No authority is conferred upon the trustees, executors or other persons to dispose of this property under any conditions or circumstances whatsoever. Niether the death of the daughter or of the Appellee is in any way to alter or

affect the determination of the testator to have this property in one body until the expiration of the time fixed by him. Mrs. Vertner can sell the home over her head and buy a new one, the executors can sell the real estate in Texas and turn the money over to the trustees, but neither the trustees, executors or beneficiaries or all of them combined can dispose of this property in the District of Columbia. Undoubtedly therefore, the general plan of the testator was to have this property conserved in one body until 1928.

The trust thus created by the testator is not merely a part of the machinery for accomplishing a subsequent intention towards any objects of his bounty, but was primarily created and intended for the purpose of conserving this property and holding it together for a fixed period without reference to consequences. The disposition of the income was not a necessary element of the trust. It was an incident and an outgrowth, and of course, dependent upon it.

If the attempted trust embodies the general scheme or plan of the testator as to his Washington real estate, does the testaor's direction to his trustees to pay Appellee forty dollars per month—being a part of the monthly income of the trust property—rest upon the void trust, or is it wholly independent of it, so that it can be established without reliance upon the void trust?

The testator's will emphatically answers this last question in the negative.

He directed this sum to be paid to Appellee monthly by his trustees from the income of the property held by them in trust, and by no other person or persons whomsoever, and from no other source whatsoever. Who is to pay the money except the trustees? Where are they to get it except

from the income of the trust property? Nowhere within the four corners of his will can be found an intent or purpose by the testator that the Appellee shall be paid one penny separate from and independent of the trust he creates in item 5 of his will. On the contrary, every dollar to be paid to her by his direction is the fruit of this trust. How then is it possible to say that the provision of forty dollars per month for Appellee, and the void trust of item 5 are wholly independent of and entirely separated from each other.

It is not sufficient that the provision for the Appellee may be separated from those made for testator's daughter and his grandchildren. The thing that must be done is to show also that the provision for the Appellee is wholly separate from and in no wise dependent upon the void trust; and the Appellee must show from what other source than the void trust her money is to be paid.

The title to all the Washington property is covered by a single item placing it in the hands of trustees for a gross number of years; the provision for the Appellee is nothing more than a direction as to the payment of a portion of the income of the trust property and it has no reference whatsoever to the title. It seems impossible that this solitary item, covering solely a portion of the income of a void trust, should have the marvelous power of transferring the title and creating a valid trust, in the same property, that has been covered by a void trust.

It is said, however, that the testator specially directs that the income from 611 M Street shall be paid to the Appellee; but with equal clearness and force he specially directs that the income from the other nine houses in Washington shall be paid to his daughter, Mrs. Vertner, and for the support, education and maintenance of his grandchildren. (R. 10, 11, 19, 20.) The income in each instance comes from the void trust.

By item 8, he directs that in the event of Appellee's death before January 1st, 1928, "the rents and revenues derived from said lot (611 M Street), shall be disposed of in the same manner as provided in item 7 hereof, in regard to the rents and revenues of other property mentioned therein." Nobody pretends that this provision, or that of items 5 and 7 for Mrs. Vertner and her children, is independent of the void trust. On the contrary, the record shows that all parties concede that these provisions are absolutely void because the trust out of which they grow is void. And yet the rights of the Appellee, and of testator's daughter and her children, rest under the will, on one and the same indivisible foundation, which the Courts have destroyed absolutely.

If the trust as to all the Washington real estate is void, as is conceded by the record, how can subsequent provisions of the will relating solely to the income make that title legal which was before illegal, and legally transfer the tite to trustees when the testator's effort to do so was illegal?

Even if item 6 specifically sets apart the rents from 611 M Street for the Appellee, it does not extend to all the rents from all the trust property, or warrant the Court in giving her a first claim on all the funds the trustee may collect and a lien on all the property of the testator wherever situated. Surely this is the largest inference that was ever drawn from so small a premise.

Mr. Justice Anderson while decreeing that the trust is wholly void, excepts from the results of his decision the claim of the Appellee. In doing this, he makes statements as follows:

1. "In so far as lot 611 M Street is concerned, the *primary purpose of* the testator in writing into his will

item 6 and 8 was to provide therefrom, that is from the rents of said lot, for the support and maintenance of his niece during her life. (R. 36.)

2. "In the first place, it is not illegal in itself and in the second place it is easily separable from the other provisions of the will and is in no wise *dependent upon them either for its origin or execution.*" (R. 36.)

3. "It is not necessary in order to give full effect thereto to restore the will in its entirety, for the simple reason that the will under consideration is one in which *separate* and *distinct trusts* are created. The trust in favor of the complainant is in the nature of a rent charge. It is something reserved out of realty or fixed as a burden on an estate in lands, and in this case can be enforced by an appropriate proceeding as though it were the *sole provision* of the will." (R. 37.)

4. He was at the same time properly careful so to make it as not to interfere with the *alienation of the property itself.*" (R. 38.)

5. "Instead, however, of defeating the *general scheme* of the will, complete effect can be given to item 6 without relying in the least upon the other clauses of the will, as the complainant can take under that clause of the will without regard to whether the other clauses of the will are good or bad, within the meaning of the law relating to perpetuities. The *trust created* in her favor is a *separate and independent trust.*" (R. 38 and 39.)

6. "The trust created in favor of this complainant, as I have already said, is in no wise dependent upon the other provisions of the will either for its *origin* or *execution.*" (R. 40.)

7. "Therefore he laid his hand upon *one particular piece* of his property and he said in effect, that while I shall write nothing in this will that shall affect the *right* of *alienation* of this property, I will write a provision that will insure to this complainant, my niece, the sum of at least, forty dollars per month during her natural life." (R. 40.)

8. "In other words, in the case at bar, the will segregates *a certain piece* of real estate from the entire

holdings of the testator and appropriates the rents and profits thereof to the separate use of one beneficiary."

In each one of these statements I submit, with all respect, that the Supreme Court fell into manifest error.

Replying thereto, I maintain that one item of a will, which disposes of the income from one specific piece of property, cannot be held to embody the *primary purpose* of the testator; and that it is a total misapplication of the principle of law, as to the primary purpose of a testator, to limit its application to one solitary item, which relates solely to the income from one solitary piece of property, the title to which has already been disposed of by other items of the will in conjunction with nine other pieces of property lying in the same jurisdiction. If the *primary purpose* of the testator can be gathered in this way, then the ascertainment of the general scheme and plan of wills upon which the Courts have laid so much stress, becomes of no value. Under such a rule the testator, instead of having one primary purpose with reference to property within a certain jurisdiction, might have ten or twenty, according to the number of paragraphs in his will.

To assert that this item of forty dollars per month for the Appellee is in no wise dependent upon the other provisions of the will, either for its *origin* or *execution*, is to forget entirely that the only source from which this money can be derived is from the property in the hands of the trustees, which embraces as well 611 M Street, as the other houses in Washington. So far from being independent of the other provisions of the will, the very source from which this forty dollars per month arises is created by the 5th item of the will establishing the trust. The trustees can have no income except from the property committed to them in trust. Item 6 of the will does not transfer the title of 611 M Street to the trustees. Item 5 does

do so. How then is it possible that the provisions of item 6 of the will are wholly independent of item 5? Just as well say that a stream of water is independent of the source from which it springs.

It is alleged that the trust for Miss Jordan is a separate and distinct trust. On the contrary, I respectfully submit that no trust was created for Miss Jordan. The testator in one item of his will directs that of the money coming into the hands of his trustees forty dollars per month shall be paid to Miss Jordan, primarily out of the rents of 611 M Street. That does not create a trust for Miss Jordan. The trust was created when the property was put in the hands of the trustees by item 5 of the will, and so far from Miss Jordan having a separate and distinct trust there is only one trust created by the will; her rights are wholly dependent upon it; she is simply one of a number of beneficiaries to whom a portion of the income from the trust is to be paid monthly. If the trust is good, her claim is good, and if the trust is void, her claim necessarily falls with it. Justice Anderson himself says, that what she has is "in the nature of a *rent charge* which is something reserved out of realty or fixed as a burden on an estate in lands." (R. 37.) Her rent charge comes out of the void trust and can come from no other source.

Justice Anderson cites the leading case of Shipman vs. Rollins, 98 N. Y. 311, establishing this doctrine which holds that "inasmuch as the bequest was void because it was not to be paid over until after the determination of three lives in being at the death of the testator, thereby resulting in *an illegal suspension of the powers of alienation beyond two lives*, the bequest of *the income* of the fund was likewise *void. The foundation being condemned, the superstructure resting upon it fell with it.*" (R. 39.)

It is said that the testator was careful not to interfere with the alienation of the property itself. It is conceded

that the title to 611 M Street, as to all the other Washington property was placed in the hands of trustees until 1928, and not only was the alienation of the property interfered with, but it was distinctly and absolutely prohibited, and for that very reason, Justice Anderson himself has held, that the trust in the will was absolutely void.

It is said that the testator wrote nothing in his will that affects the right of alienation of this property. This is directly in the teeth of the decision of Justice Barnard, Justice Anderson and Chief Justice Shepherd.

Fnally it is asserted that the will segregates a *certain piece* of property from the whole of the property of the testator and appropriates the rents and profits to one beneficiary.

On the contrary, the testator specifically includes this one piece of real estate in the item transferring all of his Washington realty to trustees. Justice Anderson himself holds that all the Washington property is embraced in the void trust. (R. 33.) Even if the testator had segregated one piece of property and appropriated the income specifically, does that furnish a basis for a judgement against all the property of the testator wheresoever situated? To hold that the specific mention of one piece of property embraces all the property of a testator in three separate jurisdictions, is a most dangerous doctrine. It has been done in this case for the benefit of Miss Jordan. I submit that it is wholly without warrant either in the testator's will, or in the law of the land.

These statements and conclusions set forth in the opinion of the Supreme Court of the District of Columbia being, I submit, every single one of them, without proper foundation in fact or law, cannot form a proper basis for excepting Miss Jordan's claim from that of the other beneficiaries of the testator's bounty and from a trust conceded to be absolutely void.

The Court of Appeals in its judgment merely refers incidentally to that portion of the will creating the trust from which the money to be paid the Appellee is derived, and proceeds to state that: "The following items of the will *only are of importance in the determination of this case.*" The Court then cites items 6, 7, 8, 20 and 21 in so far as they relate to the claim of the Appellee.

The easiest of all ways to find that one item of a will is wholly independent of the others is to disregard the other items entirely. The Counsel for Appellee appear to have persuaded the Court of Appeals to adopt that method in this case. The judgment of the Court of Appeals does not reiterate the statements made in the judgment of the Supreme Court above quoted, but cites a number of cases to sustain the position taken by the Court. An examination of these together with those cited by Justice Anderson will, I submit, show that they do not sustain the position that Miss Jordan's claim is independent of the trust.

CASES CITED BY THE JUDGES BELOW DISTINGUISHED.

In *Savage vs. Burnham 17 N. Y. 561* the valid limitations were sustained on the *express ground* that thereby the *general plan of the testator would be promoted rather than defeated.* (See p. 576 of case.) But in the case at bar it can not reasonably be said that the *"general plan"* of the testator would be promoted rather than defeated by destroying entirely his cherished scheme of tying up the property for a fixed period while preserving the provision for Appellee. In short, the illegal scheme itself was the *"general plan,"* with regard to the Washington property. Therefore the preservation of the provision for Appellee can in no way promote the *"general plan"* of the testator. On the

contrary, the *"general plan"* must fail in all events and hence the provision for Miss Jordan, a subordinate and dependent part thereof must also fail under the authorities already cited.

In *Harrison vs. Harrison 36 N. Y. 543* a testator provided that the income of his estate should go by means of a trust to his widow and children, one third thereof to his widow and two thirds to his six children in equal parts with limitation over to each child's issue upon attaining twenty-one of the respective portion of that part of the testator's estate to the income of which their deceased parent was entitled.

Held: That the limitation over was void. But the provision for the *payment of income* to his children was preserved on the ground that to do so *would not* defeat the *"general intent"* of the testator, which the Court held was to provide for the family during their lives, this object being accomplished by the Courts preserving the *income provisions*, the capital going absolutely to the issue of the children upon the death of said children. In the case at bar, however, the *"general intent"* of the testator, viz.: to tie up his estate, etc., can not be preserved, therefore it is distinguished from the case cited for the reasons given in the criticism of *Savage vs. Burnham, supra.*

In *Burley vs. Everlyn, 16 Sim. 294*, the facts were very different from the present case. There was no definite time fixed for the duration of the trust nor was the testator's *primary intention and general scheme the creation and continuance of an illegal trust* as is the case here. In the case cited the testator simply intended to provide for his nephew and his nephew's issue *and that was his primary and main intent*, and the Court sustained the provisions so far as valid, the invalid parts being clearly separable from the valid.

In Blagrove (not "Gladdner") vs. Hancock, 16 Sim.

371, the question of the separibility of the valid provisions was *not raised and was not passed upon or mentioned.*

In *Tiers vs. Tiers 98 N. Y. 568*, the provision sustained were preserved upon the ground that they embodied the *"general scheme" and "primary disposition"* of the testatrix, and that of the two ulterior contingent limitations which were void, the one was "quite separable from the *primary trust* and merely *incidental*, its only purpose being to provide for a contingency which may never arise," and that *the failure of that provision "would not affect the general scheme,"* while the invalidity of the other void provision did not affect (it was held) the *"primary disposition in trust."*

In the case at bar, however, so far from the void provision being "incidental" and *not affecting the "general scheme"* or "primary disposition in trust," it *is* the *"general scheme" itself* or primary disposition in trust, so that the decision in the case cited is no authority for sustaining the subordinate and dependent provision for Appellee.

Oxley vs. Lane, 35 N. Y. 340. Here again the ground upon which the provisions valid in themselves were sustained was, that the void provision were *"not an essential part of"* the testator's *"scheme of disposing of his estate"* and might be dropped *"without affecting the primary disposition of his estate."* Hence it is clearly no precedent for the case at bar for the reasons given under *Savage vs. Burnham, and other similar cases, supra.*

In Van Schuyver vs. Mulford, 59 N. Y. 426, a testator gave his estate to trustees and after *first* providing that his widow should have the income so far as necessary for her support, in another and subsequent clause provided that after the wife's death, the income should go to the daughters, and at their death that the capital should go to their issue.

Held: That the devise over to the issue of the daughters was void; but that the provision for the wife was not af-

fected, *being the "primary object"* of the testator and not being *inseparably connected with the invalid provisions.*

But surely in the case at bar the provision for Miss Jordan is not the *"primary object"* of the testator with reference to the Washington property. He did not carefully and in emphatic language tie up the *whole of said property* in trust for a fixed period, for the *primary purpose of providing* for Appellee. On the contrary, the provision for her is merely a *subordinate and dependent part of the general trust scheme and was so intended by the testator.*

In Burns vs. Allen, 89 Hun. 552, 35 N. Y. S. 342, the testator by the *Seventh Clause* of his will devised the residue of his estate to *trustees to aplpy the income to the support and education of his daughter.*. By the *Ninth Clause* he provided that in case the daughter left children the estate should go to them equally when the youngest child reached twenty-one, and if none of them reached that age that the estate should go to the nephews.

Held: That the validity of the Seventh Clause was not affected by the Ninth Clause, because, in the language of the Court "the provisions of the *Seventh Clause created the trust* and for the purpose of its execution, they are *complete and independent of those which follow"* (that is of those of the Ninth Clause).

In Loring vs. Blake, 98 Mass. 253, the Court was concerned with a question of powers, and seems to have held that an invalid exercise thereof did not affect a valid exercise in the same instrument, on the ground that the invalid provision might be dropped *without affecting* her "general scheme" or "main purpose." The facts were very unlike those herein and the general reasoning of the Court is in favor of our contention.

Lovering vs. Worthington, 106 Mass. 86., devise of certain real estate to trustees to pay the *rents and profits to testator's daughter for life and at* her death to her children

and at the death of each child a portion of the estate to go to his or her heirs absolutely.

Held: That if the limitations to the heirs of the children were void it would not defeat the prior life estates. In that case the provisions sustained were *prior to, separable from, independent of* the foundation of the subsequent limitations supposed to be invalid. Whereas, in the case at bar the provisions for Appellee is *subsequent to the void provisions* (item 5 of will) is expressly *founded and made dependent thereon* and is an *identical part thereof.* In short, the present case is the converse of the one cited.

In Graham vs. Whitridge (Md.) 57 Atl. 609, the provisions were very similar to those in Lovering vs. Worthington, just noticed, to wit: a prior devise of life estates to the children of testatrix's nephews with a subsequent remainder in fee to their descendants.

Held: That the life estates to the children were not affected by the invalidity of the limitation over to their descendants.

To this case the same remarks apply as to the Lovering vs. Worthington, supra.

In Leonard vs. Burr 18 N. Y. 96. there was a devise of certain property to B *until* a *certain place should be incorporated as a village* and *then* to the trustees of said village in trust to establish a library.

Held: That the estate of B terminated upon the happening of the contingent event, the incorporation of the place, irrespective of the validity of the devise *of the* subsequent estate to the trustees. The grounds of the decision were: (1) That the estate in B was a base or *qualified fee* which *would in any event regularly terminate* of itself upon the happenings of the contingency and was therefore unaffected by the devise over.

(2) That the decision would preserve the "general intent" of the testator.

Neither of these grounds exist in the present case. Furthermore in the case cited there was *no trust created* in the first instance but *only after the termination of the base or qualified fee* in B. Whereas, in the case at bar *the illegal trust* is *first* created, and the provision for Appellee is subsequently founded and made dependent thereon.

In Saunders vs. Vautier 4 Beav. 115, and in *Curtis vs. Lukin 5 Beav. 147* the question of the separability of the valid and invalid portions of a will was *neither raised or discussed,* as a glance at the cases will show.

In Dupre vs. Thompson 8 Barb. (N. Y.) 537, the question was whether certain trusts in a *conveyance inter vivos* were legal. The Court *held* that they were *legal,* and made the purely *obiter* remark that *if* they were illegal it would not affect other trusts in the same instrument. The only *point decided* was as to the legality of the trusts attacked as illegal and invalid *per se.* Furthermore, the nature of the instrument's provisions is only partially shown by the report. Clearly, then, under such circumstances the *purely obiter* remark of the Court above referred to is authority for no proposition. The dictum that the legal parts will be preserved if they do not of necesstiy *uphold* the illegal parts is unsound on its face, and in direct conflict with all the authorities we have been able to find.

In Goldsborough vs. Martin 41. Md. 488, a testator devised one-half of his estate to his wife in trust to pay over the income to his daughter. In case of the daughter's death without issue, the will provided that the trust estate should go to the wife in fee, but in case the daughter should leave issue, the trust should be extended to and for the benefit of said issue in the same manner as directed in the case of the daughter.

Held: That the clause extending the trust for the benefit of "the issue" of the daughter was void as violating the rule against perpetuities. But that its invalidity did not affect

the previous trust for the benefit of the testator's daughter.

The distinction between this case and the one at bar is obvious. In the first place, in the case cited, the testator's "primary intention" was naturally to provide for his daughter. (He had already amply provided for his wife by other clauses of the will.) In making this provision, however, he did not wish to give her the absolute control of the property, but restricted her to a life estate. Cutting off the illegal limitations left both these intentions intact, viz, his *primary intention* to provide for his daughter and his intention that she should have only a life estate. But in the case at bar, the *primary intention* of the testator was *not to give forty dollars a month to Appellee* but to *tie up* his Washington estate *so that his daughter and her children* should have ample provision therefrom and yet have no control thereof until the expiration of a fixed period. He wished to guard against their indiscretion and *accumulate a large property for them.* Now this whole primary intent or general scheme is illegal so that it cannot be preserved in any event.

In view therefore of such radical difference in the facts of the two cases, the decision in the case cited is no precedent herein.

James vs. Veasley, (cited as in 14 Hun. 523) seems to be wrongly cited as I have been unable to find it in the volume named.

I pressed upon the attention of the Court of Appeals, the injustice of selecting one out of a number of beneficiaries to whom the income of the trust property was to be paid according to the will, all of them standing upon exactly the same footing, and to be paid from the same income, derived from the same property, by the same trustees and at the same time. Responding to this suggestion, the Court declares:

> "By the terms of her bill the complainant *limits* her right of review to so much of that decree only as undertakes to annul the trust for her benefit in lot 611 M Street, N. W., and in so far as it may affect her contingent right to a monthly income of forty dollars during life, to be made up from the revenues of other property in the District of Columbia in the event that the revenue of the said lot shall fall short of that sum." (R.55.)

Manifestly, the Court overlooked the third prayer in the bill of review which begins with these words:

"That for the reasons and errors and under the circumstances aforesaid, *the said final decree may be reviewed and set aside and no further proceedings be had thereon.*"

The prayer is that the entire decree may be both reviewed and set aside and no further proceedings be had thereon.

The opinion of the Court of Appeals hinges upon the proposition that:

> "On the other hand, a trust for general purposes may be void because unauthorized by law without necessarily rendering void a particular trust in the same will made to subserve another purpose that is authorized." (R. 55.)

To support this, the Court relies upon Savage vs. Burnham, 17 N. Y. 561, 576.

In reply I insist:

1. That when a testator creates a trust by placing all of his real estate lying in the District of Columbia in the hands of trustees for a gross number of years, and in another item of his will directs that the income derived by his trustees from one of the pieces of property in their hands shall be paid to one beneficiary, he does not thereby create a separate or distinct trust in that special piece of property.

It amounts to no more than an application by the testator of a portion of the income from the general trust, and is so connected with and dependent upon the general trust, that it must stand or fall with it, unless indeed there can be such a thing as living fruit from a dead tree.

2. The case of Savage vs. Burnham relied upon by the learned Chief Justice, I submit, does not support the doctrine announced by him. In that case, the testator devises his real estate in trust, the income to be paid to his widow during her life and after her death the corpus to be converted into cash and invested by the trustees, the income of which they were to pay to the children of the testator with remote limitations to others.

The Court held: That the provision creating the trust and placing the real estate in the hands of trustees was *valid;* that the provisions for the children of the testator were likewise valid, but that some of the remote limitations were invalid; and that inasmuch as the original trust was valid, the provision for the widow and the children could be sustained, notwithstanding the invalidity of the remote limitations, because they were within the law and because that thereby the Court was carrying out the *main purpose* and *intent* of the testator. In our case, the original trust is invalid, and no one can pretend that the allowance of forty dollars per month to his niece was the main purpose of the testator in making his will.

This case of Savage vs. Burnham is a fair sample of all the authorities relied upon in behalf of the Appellee. It creates a trust with directions to pay the income, first to the widow, second to the children, third to other beneficiaries. The courts uniformly hold that if the payment to the widow and the children is clearly the main purpose of the testator, the more remote limitations may be cut off without affecting the first two which fall within the provisions of the law.

In the case at bar, however, there are three beneficiaries, first, Mrs. Vertner, second, the grandchildren, and third, Miss Jordan, the Appellee. These three stand in equal right and are to be paid from the same fund, at the same time and by the same trustees. What authority is there in the case of Savage vs. Burnham, or other similar case, for holding that the Court is at liberty to select one of these three beneficiaries, and leave the other two; and after declaring the original trust void, to re-establish the claim of Miss Jordan and set up a trust in her behalf, solely upon one item of the will which merely directs the payment to her of a part of the income from the void trust; and then proceed to place the whole of the Washington real estate in the hands of trustees, and give her a lien upon the property of the testator wherever situated?

If a single item of a will directing the payment of a small portion of the income from a trust, which has been declared void, can revive and resuscitate the trust, then the law relating to perpetuities is deprived of its whole force and effect.

I insist that item 6 of the will has no such inherent force and power as to create a trust for Miss Jordan and to override all the rights of her co-beneficiaries and all those provisions of testator's will, which have not been impugned or attacked in any way.

The point is made that inasmuch as the testator directs the income from 611 M Street to be paid to Appellee, he thereby creates a distinct and separate trust for her. That I insist is not the fact. But even if that be true, the Court is not warranted in extending this special trust by taking the whole of the Washington property from the heirs at law and placing the title in trustees, and giving the Appellee a first lien upon all the property of testator in Virginia and Texas.

Under the will of the testator, (R. 10) his property in Virginia could be sold and a complete title made, and if held as part of his estate, it was to descend to his grandchildren equally, at the death of their mother. Under the decree of the Court, no such sale can be made without the consent of the Appellee or without being subject to her lien, which of course would seriously affect the value; and if it descends to the grandchildren, it must be with the debt to Miss Jordan hanging over it.

The real estate in Texas is not in the hands of the trustees, and is not to pass into their hands. It is to be sold eventually and the money used for the grandchildren of the testator. (R. 13-14.) That portion of the will stands unimpeached, and yet the decree of the Court in this case gives the Appellee a first claim upon this property in the very teeth of the directions of the testator with reference to it, and all this is done under the theory that the Court is carrying out the testator's will.

According to the will of the testator, the title to 611 M Street, after 1928, and after the death of the Appellee, is to vest in Thomas K. Vertner; and the title to the other nine dwellings in Washington, after 1928, and after the death of Mrs. Constance K. Vertner, are to vest in the testator's three grandchildren.

By the will therefore, there are two conditions stated upon which the ten pieces of property of the testator are to vest in his grandchildren. The limitation of 1928 has been eliminated by the Courts declaring the trust to be void. Mrs. Vertner is dead. If the will of the testator is of any force as to his Washington real estate, the title to these nine pieces of real estate vested, upon Mrs. Vertner's death, in the testator's grandchildren. If the will is of no force then the property descended to them as his heirs at law at his death.

What authority is there in the Supreme Court of the

District of Columbia, or any other Court, to declare that the title to these nine dwelling-houses shall not vest in these grandchildren at the death of Mrs. Vertner, but that such vesting shall await the death of Miss Jordan? Her name is not mentioned by the testator in connection with the title to these pieces of property. If the will is of no force, the grandchildren must take as heirs at law. If it is of force, it is certainly as efficacious for the grandchildren as it is for the niece; especially when we remember that the testator, the owner of the property, specifically directs that it *shall* vest in his grandchildren at the death of their mother. I submit that there is no authority under the will, or under the law, to make the vesting of this property depend upon the life or death of some one whom the testator has not even mentioned in connection with it.

All these amazing results are said to be wrapped up in and come out of item 6, in which the testator, in the kindness of his heart, directs the application of a small part of the income from an illegal trust.

If the claim of Appellee is wholly separate from and entrely independent of the other parts of the will, why should this property be taken from the testator's grandchildren, and why should the will of the testator be rewritten so that the vesting of the title shall depend on Miss Jordan's death instead of Mrs. Vertners?

There is neither justice or law for holding that the rights of every other person named in the will of the testator, shall be made subservient to the claim of the Appellee, and that all of their rights shall be put in jeopardy in order that she may secure forty dollars per month. The testator has never said that this distant relative should wreck the prospects of his only descendants.

In Tilden vs. Green, 130 N. Y. 29, 50, it is held: That the rule holding that one trust may be valid and another

void is "applied only in aid and assistance of the manifest intent of the testator and never where it would lead to a result contrary to the purpose of the will, or *work injustice among the beneficiaries,* or defeat the testator's scheme for the disposal of his property."

In this case, brought solely to determine whether a trust as to the Washington property is contrary to law, what authority has the Court below to give the Appellee a decree against the entire estate for all sums claimed to be due to her, past, present or future?

Her prayer is that the final decree in the original case be reviewed and set aside, and that "she be *permitted to remain* in the *undisturbed enjoyment* of the rents and revenues derived from the real estate *situate* in the *District of Columbia* as provided in *the 6th item* of the said will."

In response to that, the Court has created a new trust, given a money judgment and established a lien upon real estate not in the District of Columbia or mentioned in the 6th item of the will. The other beneficiaries receive nothing; Miss Jordan is given more than she asks for.

III.

HAVE THE NECESSARY PARTIES BEEN BROUGHT INTO COURT?

I insist that Mary B. Kearney, widow of Edmund Kearney, son of the testator, who died after his father, is a necessary party to the bill of review.

That all parties whose interests are to be affected by the judgment of a Court shall have a hearing before their rights are adjudicated, is one of the plainest axioms of law, and any other course is absolutely inconsistent with justice. Edmund Kearney, testator's son, died after his father, leaving a will which, having only one witness, could not pass

real estate in this jurisdiction, (R. 23). Hence Mary B. Kearney, as the widow of her deceased husband, is entitled to dower in the real estate of which Thomas Kearney, her husband's father, died intestate. Justice Barnard decreed in the original case that the testator died intestate as to all of his Washington real estate, and that it descended to his heirs at law. (R. 24.) That decree was confirmed by the Supreme Court of the District (R. 33.) and by the Court of Appeals, (R. 57.) and no apeal from it has been taken by any party to the case. It is now proposed to enter another decree declaring that as to this property Doctor Kearney did not die intestate, but that the Appellee has by his will, a first claim upon it for forty dollars per month. That cannot be paid to the Appellee without deducting a portion of the dower due and payable to Mrs. Kearney. The authorities showing who are necessary parties are perfectly clear.

"If any person, not a party to the original suit, becomes interested in the subject matter in controversy *by operation of law*, or under a distinct claim not derived from one of the parties, he *must* be made a party to the bill of review, and is not bound by the proceedings under it, unless he be made a party."

Debell vs. Foxworthy's Heirs, 9 B. Mon. (Ky.) 228, 231.

"*All whose interests* are to be affected by a decree should be made parties to a bill of review to reverse it."

Turner vs. Berry, 3 Gilman (Ill.) 541-43, citing—
Bank of U. S. vs. White, 8 Peters, 262-8.
Story's Eq. Pleading, 420.
Daniel Chan. Pleading and Practice, 6th ed., Sec. 1580.
Singleton vs. Singleton, 8 B. Monroe, 349-50.

Mrs. Kearney became entitled to dower in an undivided one-half of the real estate in the District of Columbia

(Rec. p. 23) upon the filing of the decree of June 27, 1900, declaring the will invalid as to the real estate in the District, and the said real estate descended to the heirs of testator as if he had died intestate. She, holding an interest in said real estate, was a necessary party to the proceeding in the lower Court.

2d Enc. of Law, 1st ed., 264.
Story Equity Pleading, Sec. 240.
Turner vs. Berry, sup.

On passing upon the question of the necessity of Mrs. Kearney being a party to the bill of review, the Supreme Court (Rec. p. 32) cites Fletcher's Equity Pleading, Sec. 925, as follows:

> "All parties whose interests are to be affected by the original decree are necessary parties to the bill of review."

Said section, by note, citing—

Turner vs. Berry, sup.
Creed vs. The Lancaster Bank, 1 Ohio st. 1.

The Supreme Court also cites the case of Corcoran vs. Couper, 2 Del. ch. 27, to the effect that a bill of review lies against those only who were parties to the original decree. In Fletcher, supra, the contrary doctrine, to-wit, "that all parties whose rights are affected are necessary parties to the bill of review," is laid down in the text and supported by the recent decisions, but in a note the author refers to the case of Corcoran vs. Couper, above quoted, as being one instance in which the contrary doctrine was held many years ago, but there seems to be no authority supporting this case.

The Court of Appeals passing upon this objection states:

> "The objection that she was a necessary party was not raised by plea, answer or on the face of the demurrer, but by suggestion on the hearing founded

solely on the fact recited in the answer of Constance K. Vertner to the original bill, filed M[redacted] that [redacted] a widow [redacted] descendants. No request [redacted] that she be made a party to the suit, and the case proceeded to final decree without her. It is to be remarked also that there is nothing to show that she was living at the time the bill of review was filed."

The learned Judge has evidently overlooked entirely the bill of review filed by the Appellee. One of the chief grounds upon which it was contended that the original decree was void is stated as follows:

> "In adjudging, ordering and decreeing relief upon said bill in the *absence of proper and necessary parties to the suit*, neither the said Edmund Kearney (if living), or if he were dead, his personal representative having been made a party, nor any proof made that he died without issue him surviving, or that the said Constance K. Vertner was his sole heir at law, or that he died intestate."

In view of this record, how can it be said that this whole question of the rights of Mrs. Kearney depends upon the unsupported statement of the answer of Mrs. Vertner to the original bill? Appellee charges want of necessary parties in the original case, neglects or refuses to make them parties to her case and then prays the Court to give judgment against them without a hearing.

Mrs. Kearney may not have been a necessary party to the original bill, because the will had been admitted to probate and was standing on the records of the Courts as a valid instrument. So long as it so stood, Mrs. Kearney had no interest in the real estate. But when Judge Barnard filed his decree she became a party in interest, her

rights were fixed by it, and she was a necessary party to any subsequent proceedings proposing to re-establish the will, or any part of it, and thereby, deprive her of her rights or any part of them.

Why should my clients be left to pay Mrs. Kearney $20 per month or suffer further litigation simply because Appellee won't take the trouble to bring all parties in interest into Court? While one party is being paid out of this property because the owner died intestate and another is paid because he died testate my clients are being ground betweeen the upper and nether millstone and it is all said to be the will of the testator!

No decree can be made in this case giving the Appellee forty dollars per month without depriving Mrs. Kearney of part of her rights in this property. Wholly outside of the unbroken current of decisions, the injustice of taking her property from her without an opportunity to be heard in Court is too manifest to require argument.

REPLY TO THE BRIEF FOR APPELLEE.

The points made by Appellee are as follows:

1. The annuity given in trust to Miss Jordan is for her lifetime, and the gift is valid. It may be readily separated from the other trusts, even if these other trusts shall be found to be in violation of the statute against perpetuities.

2. Mr. Justice Barnard was without jurisdiction to entertain the suit, and the decree entered by him is null and void.

3. All the trusts in the will are valid, and this Court may properly modify the decree of the Court below, so as to require that the Court of first instance shall entirely set aside the decree of 27th of June, 1900.

A. The first contention of Appellee has been so fully discussed in this brief, that it is unnecessary to reply at length.

I submit, however, that in the cases cited by the Appellee, the portions of the will held void did not embody the primary purpose or main intention of the testator, or the general scheme of the will as is the fact in the case at bar. Their invalidity therefore, did not invalidate the other portions of the will which were valid in themselves. The invalid provisions in those cases were subordinate parts of the will and could easily be cut off without affecting the general scheme or the main intent of the testator. In the case at bar, however, the main purpose and general scheme of the will with regard to the Washington property was to keep it in trust until 1928; the *void trust*, in fact, is not only an essential part of the general scheme, but is the *general scheme itself*.

Stress is laid on the fact that the annuity to Appellee is to be paid only during her lifetime. Does her Counsel know of any case where it was paid after the lifetime of the beneficiary? If not, wherein does this case differ from the others that the Courts have decided against the contention of the Appellee?

The Appellee relies upon Montignani vs. Blade, 145 N. Y. 3, 39 N. E. 719. In that case there was a provision that property should be held in trust for ten years, and at the end of that time vest in two persons named; but the testator further expressly provided that in case of the death of said persons before the expiration of the ten years, then the property should vest absolutely and *at once* in certain others. In other words, the testator expressly directed that in no event should the trust or suspension last longer than the lives of the two persons in being. Whereas, in the case at bar, Doctor Kearney plainly provides for the continuance of the trust absolutely and at all events until the expiration of the gross term. He distinctly reiterates that under no conditions shall the title to the property descend to the

parties named until the 1st day of January, 1928. The case from New York is just as much like the case at bar as it is possible for two things to be that are the exact opposites of each other.

In re., Hendy's estate, 118 Cal. 659-50 p. 753 cited by Appellee is a very different case from the one at bar.

There the life of "J. G." and a portion of the lives of her two children, viz., until they reached the age of twenty-five, were expressly fixed and selected by the testator as the measure of the period of suspension. So that the case is by no means one in which a gross or fixed term was selected as in the case at bar. Indeed the Court in the Hendy case clearly recognizes the distinction between that case and such a case as we have, where an absolute, definite and fixed term is chosen as the period of suspension.

B. Appellee's second contention is, that Justice Barnard was without jurisdiction to entertain the original suit and the decree entered by him is null and void.

This question can not be raised by a bill of review.

"A bill of review assumes that the Court had power to act, and therefore want of jurisdiction which renders the decree void is not ground for the bill."

16 "Cyc" 529.

In Friley vs. Hendricks, 27 Miss. 412-418, it was contended by the party filing the bill of review, that the Court had no jurisdiction of the original bill, and that therefore, its decree was void. The Court refused to consider the contention saying:

> "The objection is suicidal, for if there was no jurisdiction to render the original decree, there is no jurisdiction to review and reverse it."
>
> See also Donaldson vs. Nellis, 108 Tenn. 638.
> 69 S. W. 732.
> Berdanatti vs. Sexton, 22 Tenn. Chan. 699-703.

Independent of these authorities, however, I submit the Court had jurisdiction of the original bill.

(*a*) *To construe the will.*

"When a trust is created, however, equity has jurisdiction of a suit by the trustee or cestui que trust for the construction of a devise of real estate."

22 Ency. of P & Pr. 1194.

In Lorillard vs. Coster 5 *Paige* (N. Y.) 172, 175, *and Hawley vs. James id. 322,442,* Equity took jurisdiction of bills filed *by trustees* for the construction of wills, and furthermore passed on the *validity* of the trusts in the wills.

See also:

Minkler vs. Simms, 172 Ill. 323, 50 N. E. 176.
Eldred vs. Meek, 183 Ill. 26, 55 N. E. 536.

There is good authority that the existence of a trust is not necessary.

22 Encyc. of Pl. & Pr. 1192 and cases therein cited.
3 Pomeroy Eq. Jur. Sec. 1157 and cases cited.

(b) *To advise the trustee as to the validity of the trust.*

In Heald vs. Heald, 56 Md. 300-307, it is held:

"But this is an application by a trustee, under a will, directed to make large investments upon certain trusts and limitations, in regard to the *validity* of which and the rights of the parties in regard thereto, grave doubts have arisen. Under such circumstances, we are of opinion he is entitled to the aid of this Court, to instruct him as to his duties."

In *Neale vs. Davies* 5 *De. G. M. & G. 258,* a bill was filed against trustees to compel them to execute their trust., viz.: to transfer a certain fund to other trustees. The trustees answered that they *were in doubt whether the trust*

ought to be executed, inasmuch as there was no evidence of the settlors title to appropriate the fund.

It was contended that the trustees were estopped to take such a position by their acceptance of the trust, that they had no right to come into Court and impugn the validity of the trust. But the Court held otherwise, saying (per *L. J. Turner.)*

"It is true that the trustees accepted the fund upon the trusts of the settlement of 1831, but there is a doubt whether it ought to be held on those trusts.. It is said that they knew of the doubt when they accepted the trusts; but I take it to be the law, that if a trustee has accepted a fund upon certain trusts and then receives information making it doubtful *whether he ought to execute those trusts,* he has a *right to come to the Court* for its *direction whether the trusts ought to be executed.* How is the case *altered by his knowing of the existence of this doubt at the* time when he accepts the trusts?"

The above case is a complete answer to the contention of Appellee that a Court of Equity has no jurisdiction of a suit by a trustee seeking the advice of the Court as to whether his trust is unlawful, that is, *"whether it ought to be executed,"* for, of course, if a trust is unlawful *it ought not to be executed.*

Such a suit is no violation of the general rule that a trustee must execute his trust; for the rule is subject to the proviso that the trust *be lawful.* As said in *Wood vs. Wood 5 Paige (N. Y.) 596,* 28 Am. Dec. 451, 453.

"So far as the trusts of a will are *valid and consistent with the rules of law,* the executor and *trustee* is bound to carry them into effect."

The first contention of Appellee, viz.: That the bill fails to allege, or throws doubt upon, the existence of a trust, is contrary to the facts. The bill in the plainest language alleges the existence of a trust and sets out

the trust provisions. Neither does it throw doubt upon the *existence of the trust as a fact*, but simply requests directions whether said existing trust is lawful, that is, whether *it ought to be carried out*. It is exactly the case of Neale vs. Davies, *supra*.

The second contention is, that no directions are asked by the bill, but solely the construction of the will, and that therefore there was no jurisdiction.

First, not only construction is asked, but further "that he shall have such other and further relief as the nature of the case shall require." (Rec. 8): In other words be advised and directed whether, or how, or to what extent *he ought to execute the trust*, as in Neale vs. Davies, supra.

Second, in Eldred vs. Meek, 183 Ill. 26, 55 N. E. 536, and 538 it was held that where an active trust existed, the fact that the bill sought no other relief than that the will be construed was no ground for dismissal for want of jurisdiction.

The original bill was filed by Thomas P. Woodward, Esq., a learned and esteemed member of the Bar of the District of Columbia, in behalf of Judge E. S. Drake, of Mississippi, a gentleman of undisputed ability and standing at the Bar of his State, in whom the testator had such confidence that he apponted him trustee with full authority to manage his estate without accountability to any Court, and the presumption is that these gentlemen would not file a suit of any character in Court without a proper basis both in fact and law.

C. Appellee's third contention is, that all the trusts in the will are valid and that this Court may properly modify the decree of the Court below and require the original decree set aside.

Judge Barnard decreed that the testator's attempted devise of his Washington property was void, and that the property descended to his heirs. The decree in that par-

ticular was affirmed by the Supreme Court of the District and by the Court of Appeals, and no appeal has been taken by any party therefrom.

The Appellee having taken no cross-appeal can not be heard in opposition to the decree of the Lower Courts upon this point.

> "Parties who have not appealed, are not entitled to be heard in this Court, except in support of the decree in the Court below."
>
> The Slavers (Reindeer,)
> 2 Wall. 383, 394.

See also:

> Loudon vs. Taxing District 104 U. S. 771, 774.
> Mount Pleasant vs. Beckwith 100 U. S. 514, 527.
> Chitenden vs. Brewster, 2 Wall. 196.
> United States vs. Blackfeather, 155 U. S. 180, 186.
> Bolles vs. Outing Co. 175 U. S. 262.
> 2 Encyc. of Pl. & Pr. 157, 158.

The argument made by the Appellee on this point is: That in case the persons in whom the property is to vest should die before 1928, the trust would terminate and that the property must therefore vest, if at all, in the lifetime of such persons, and for that reason, the rule relating to perpetuities is not infringed. This argument is fatally defective.

It overlooks the main factor in determining whether a devise is an attempt to create a perpetuity, i. e., the *intention of the testator*. The question is wholly one of intention. The test is: Would the rule be violated by carrying out the intention of the testator? If so, the provision is void, irrespective of what actually happens or may happen.

The *intention* must first be ascertained and then the rule "remorselessly applied."

> Gray on Perpetuities, Sec. 629.
> Heasman vs. Pears, L. R. 7 Chan. App. 275-283.

Applying these principles to the case at bar we see that the question is, not whether the trust would or must in fact terminate with the lives of the persons referred to, but whether the testator *intended* it so to terminate. If he did not so intend, but on the contrary intended that it should continue at all events until 1928, then the provision is void under the well settled principle just referred to irrespective of the question whether it would actually terminate before that period. No one can read the emphatic unqualified language in which the testator provided for the continuance of the trust, and doubt that he intended it to continue at all events until the expiration of the fixed term.

He declares:

> "Said trust to be *continued* in them and *their successors* until the first day of January, 1928; said trustees to have full, free and absolute possession and control of the same until the date last above mentioned, with full power to let and lease the same." (R. 9.)

In the face of such language, we are not at liberty to assume for the purpose of avoiding the rule against perpetuities that the testator *intended* the trust to cease upon the death of the persons named as final takers. It follows that the Appellee's contention, based as it is, on a disregard of testator's intention or on the false assumption that he intended the trust to cease before 1928, is unsound—the intention being the controlling factor and that intention being that the trust should continue at all events.

In the second place, the argument for the Appellee overlooks the fact that the testator did not select the life or lives of any person or persons as the measure of the period of suspension, but chose to take a gross term of years as such measure. In such case, the authorities heretofore quoted show that if the term chosen exceeds twenty-one years flat, it violates the rule.

All the provisions of the will in behalf of the daughter and grandchildren of the testator having been declared void, and all parties having conceded that they are void, if the provision in behalf of the Appellee is sustained, the Court must be satisfied that this is under the circumstances and conditions of this case, *still* the testator's will.

It must be shown to the satisfaction of the Court, that if the testator had known that all the provisions for his child and grandchildren were fatally defective, he nevertheless would have provided forty dollars per month for the Appellee; that he would have tied up the whole of his Washington property, worth possibly $50,000 and yielding probably $3,000 per annum, in the hands of trustees, to secure to this niece forty dollars per month; that he would have given the Appellee a claim on all this property superior to that of his daughter and her minor children to be first paid, and always to be paid, even if his own descendants through fire, earthquake or other misfortune receive nothing; that he would have subjected the entire income of the Washington property to the charges and commissions of a real estate agent and of trustees, the two amounting to ten per cent, making an expense of $300 annually, to collect and pay over $480 annually; that he would subject his entire real estate in Washington, Virginia and Texas, worth possibly a quarter of a million dollars to a first and prior lien of forty dollars per month to continue during the whole of Appellee's lifetime, and thus enormously decrease the market value of the whole, and render it unsalable at a fair and just price.

It is manifest that Doctor Kearney has made no such will. It is equally manifest that no sensible man would make such a will, and I insist, that it is the greatest injustice, simply because the testator, in the kindness of his heart provided for the Appellee a small income, in conjunction with his daughter and her children, to ask the Court now to make

a new will in favor of the Appellee, and to do so under conditions that Doctor Kearney never for a moment anticipated; and in this way subject his grandchildren to the grossest wrong, by giving Appellee priority over them, and at the same time subjecting his estate to unwarranted charges and expenses and to great loss in its salable value.

To give judgment for the Appellee, it is necessary that the Court shall put its strong hand on $50,000 worth of Washington real estate, which by the decrees of all the Courts in this case, belongs to Thomas K. Vertner, Edmund K. Vertner and Lillie K. Jones, the testator's grandchildren, and has so belonged since July 5, 1896, the date of testator's death. The Court now must take this title out of those to whom the Court has given it and pass it into the hands of trustees to lease, repair, insure and otherwise handle; it must tie this up during the lifetime of this Appellee, possibly twenty or thirty years, and subject it to probable deterioration, damage and loss; it must give a first lien on all the real estate of testator and give a priority and preference to Appellee over the testator's grandchildren, the only descendants he has on earth.

And because the Appellee would not make Mrs. Edmund Kearney a party to the case, her rights can not be adjudged. She must therefore continue to be paid her dower monthly, because the testator died intestate: the Appellee must be paid her forty dollars per month because the testator died testate as to the same property, and the balance of the income must be paid to the heirs at law of a testator who died intestate.

Above all, this Court must adjudge, and it must go on record in this case, that Doctor Kearney has died testate and intestate as to the same property. All these absurdities must come out of his will, and they must all be found in item six!

JOHN J. HEMPHILL,
Attorney for Appellants.

JAMES HEMPHILL,
Of Counsel.

FILE COPY.

IN THE

Supreme Court of the United States.

October Term, 1906.

Office Supreme Court U. S.
FILED
OCT 9 1906
JAMES H. McKENNEY,

CHARLES S. LANDRAM, and
JOHN A. BROADDUS,
Executors, et al, Appellants,
vs.
GABRIELLA K. JORDAN, *Appellee.*

No. 179.

BRIEF FOR APPELLEE.

CHARLES F. WILSON,
FRANK W. HACKETT,
Attorneys for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

CHARLES S. LANDRAM, *Executor, et al.*, *Appellants*,
vs.
GABRIELLA K. JORDAN, *Appellee.*
} No. 179.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Dr. Thomas Kearney, of San Antonio, Texas, died testate July 5, 1896, leaving as his heirs-at-law, two children—a son, Edmund Kearney; and a married daughter, Mrs. Constance Kearney Vertner, of Luray, Virginia. Mrs. Vertner was a widow with three children, all minors —a daughter, Lillie Kearney (now Mrs. L. K. V. Jones, of Baltimore), and two sons, Edmund Kearney and Thomas Kearney. All three children are now of age.

The testator's son, Edmund Kearney, died June 4, 1898, leaving a widow and no child. His sole heir-at-law, his sister, Mrs. Vertner, died at Luray, June 6, 1904, during the progress of this litigation. Her executors have been made parties to the record.

The real estate which Dr. Kearney undertook to dispose of by will consisted of (1) a house and lots in San Antonio; (2) A valuable ranch property, of 68,888 acres, in Webb

County, Texas; (3) A house at Luray, in which his daughter, Mrs. Vertner, was living; (4) A vacant lot on 20th Street, near F, n. w.; (5) Eight dwelling houses on F Street, n. w., above 20th Street, and (6) Two houses, 611 and 613 M Street, n. w., all in Washington.

The will, executed about a month before Dr. Kearney's death, is a voluminous document, covering thirteen pages of the printed record. (Rec., 8–22.)

The testator appears to have gone to great pains to ensure the comfortable maintenance of his daughter, the support and education of his grandchildren, and the partial support of his niece, Gabriella K. Jordan, this appellee. He creates a trust, in terms indicating a lack of confidence in the ability of his daughter, Mrs. Vertner, to take care of property.

The Texas ranch land, the value of which he says is at least $2.50 per acre, is to be sold at an early day, and after the youngest grandchild, Thomas K. Vertner, shall arrive at the age of twenty-two, three-fifths of the proceeds are to be distributed, share and share alike, to the three grandchildren, and one fifth to Mrs. Vertner.

In order to make sure that Mrs. Vertner and her children shall enjoy means of support, whatever may prove to be the result of their having this Texas ranch money put into their hands, the testator sets apart the Washington dwelling houses (except 611 M Street), and directs the trustees upon collecting the rents to maintain a fund in bank of $1,000, out of which they are to pay Mrs. Vertner a monthly allowance, and to support, educate and maintain the three grandchildren. This trust, the testator directs, shall continue until the 1st of January, 1928. Of course, if a beneficiary dies the trust ceases, as to him; although the will does not say so in express terms.

The testator evinces a strong affection for his niece, Miss Jordan. He prescribes how her comfort shall be assured

by means of an annuity, modest indeed in amount, compared with the fortune designed for his grandchildren.

Item 6 of the will reads as follows:

"I hereby authorize and direct that my said trustees shall, during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' Street, n. w., Washington, D. C.; but, in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said amount of forty dollars for each and every month, it being my desire that she shall have a regular income of at least forty dollars per month and that the same shall be paid over to her monthly; but if the income derived from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof." (Rec., 10.)

Upon Miss Jordan's death, the fee simple title to the house and lot, 611 M Street, is to vest in the testator's grandson, Thomas K. Vertner; but should Miss Jordan die before the 1st of January, 1928, the trustees will continue to hold the title until that date, paying the net rents to Thomas K. Vertner.

He directs that the rents of all the Washington property be placed in a common fund, except the rent that is to go to Miss Jordan. This common fund is to be maintained for a period named, and thereafter each grandchild is to receive the rents from separate shares of the real estate. The trustees are to pay taxes, repairs and insurance, out of the income of the Washington real estate, except that derived from the house known as 611 M Street, n. w., "which shall be paid to my niece, as provided in item 6 hereof." (Rec., 11.)

The trust, as before stated, ceases on the 1st of January, 1928, and the title to houses and lots specified vests in each of the three grandchildren, with the proviso that if Constance K. Vertner is living on the 1st of January, 1928, then the titles do not vest in the grandchildren until the death of their mother.

The will named Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake, of Port Gibson, Mississippi, as joint trustees. The former declined to accept the trust, and Judge Drake has acted as sole trustee.

Judge Drake, on the 15th of May, 1900, filed a bill in the Supreme Court of the District of Columbia, as acting trustee under Dr. Kearney's will. (Rec., 7–22.) He set forth that questions had arisen as to the validity of the provisions in the will relating to real estate in the District of Columbia, and that he had been advised that these provisions are void, "because they attempt to create a perpetuity."

The prayer of the bill was—

"That by decree of this honorable court, the last will and testament of Dr. Kearney, deceased, be construed, so far as the same deals with the real estate within the District of Columbia therein devised."

The complainant filed a copy of the will as an exhibit. Constance K. Vertner, defendant, answered on the same day that the bill was filed, namely, May 15, 1900. She averred that the will was void as to real estate within the District, for the reason that its provisions attempt to create an estate contrary to the law of perpetuities.

The bill named Miss Jordan (this appellee) as one of the defendants. Her answer, filed without counsel, is as follows:

"This defendant being advised that the bill of complaint herein involves only questions of law as to the construction of a will and as she is not advised as to the law governing

such matters and things therein set forth, she prays the Court to make such a decree herein as will protect her rights in the premises, and to this end admits the matters and things in said bill of complaint to be true." (Rec., 23.)

Miss Jordan at that time was a résident of New York, and she still resides there. Only one counsel appeared in the suit. He was solicitor for the complainant. A *guardian ad litem* was appointed for the Vertner children, May 22, 1900, and he on that day filed a formal answer. On the 23d May, 1900, a replication was filed joining issue, and the cause was calendared for a hearing of bill and answers. (Rec., 24.)

In the following month, the Court entered a decree as follows:

"This cause having been calendared, was submitted on the pleadings filed therein and duly considered; it is, by the Court, this 27th day of June, 1900, adjudged, ordered and decreed that the provisions of the last will and testament of Thomas Kearney, deceased, so far as the same devise or attempt to dispose of lands and tenements lying and being within the District of Columbia, are deemed and held to be in violation of the provisions of law prohibiting the creation of perpetuities and contrary to the statute in such cases made and provided; and it is further adjudged, ordered and decreed that said provisions of said will are deemed and held to be void and of no effect, and that as to the said land and premises the said Thomas Kearney died intestate and the same descended to his heirs-at-law. JOB BARNARD, *Justice.*" (Rec., 24.)

As this sweeping decree purported to render null and void the trust created by Dr. Kearney for his niece, thus destroying the annuity of forty dollars per month provided for her in the will, Miss Jordan, on the 29th of October, 1901, filed a bill of review in the Supreme Court of the District of Columbia, setting forth wherein she was injured by the decree, and praying that said decree be reviewed

and set aside, and that she be permitted to remain in the undisputed enjoyment of the rents derived from the real estate, as provided in the 6th item of the will. (Rec., 1–6.) The trustee, Drake, and the defendants, Constance K. Vertner and her daughter, Lillie K. Vertner, then being of age, demurred. Upon a hearing, the Justice below (ANDERSON) overruled the demurrers.

The Justice, instead of setting aside the decree, modified it to the extent of declaring the devise of the annuity to Gabriella K. Jordan valid. (Rec., 46.)

Mrs. Vertner died, and her executors having been made parties to the record, they with Lillie K. Vertner, and Drake, trustee, appealed to the Court of Appeals. That Court affirmed the decree of the Supreme Court with costs. (Rec., 57.) Judge Drake did not appeal, but the executors of Mrs. Vertner, with Lillie K. Vertner, having been allowed to sever, took an appeal to this Court. (Rec., 58.)

POINTS OF LAW.

The Court of Appeals was right in affirming the decree of Mr. Justice Anderson, giving this appellee relief upon her bill of review. We submit, however, that the scope of that decree may properly be enlarged so as to set aside entirely the decree of 27th June, 1900 (Rec., 24), improvidently entered by Mr. Justice Barnard.

The points upon which we rely are as follows:

1. The annuity given in trust to Miss Jordan is for her lifetime, and the gift is valid. It may be readily separated from the other trusts, even if these other trusts shall be found to be in violation of the statute against perpetuities.

2. Mr. Justice Barnard was without jurisdiction to entertain the suit, and the decree entered by him is null and void.

3. All the trusts in the will are valid, and this Court may properly modify the decree of the Court below, so as to require that the Court of first instance shall entirely set aside the decree of 27th of June, 1900.

I.

The Annuity Given in Trust to Miss Jordan is Valid.

Let us assume for the moment that Mr. Justice Barnard had jurisdiction of the subject matter of the suit, and that in some respects the decree entered by him is valid. We contend that, in so far as this decree pronounces void the provision for the monthly support of Miss Jordan during her natural life, it was erroneous. The direction that the trust for the grandchildren is to cease 1 January, 1928, has no application to the provision for the testator's niece. The trust for her benefit is to continue "during the natural life of my beloved niece, Gabriella K. Jordan."

In item 8 (Rec., 11) instructions are given to the trustees as to what they are to do "upon the death of my said niece, Gabriella K. Jordan." The direction is that the trust is to outlive, or at least to continue in being beyond the last moment of the life of, Miss Jordan.

Again in item 21 (Rec., 20,) the directions are that on 1 January, 1928, the trustees shall cease to hold "the title and ownership of the Washington property *not hereinbefore disposed of*," and the same is to be vested.

Here we have distinct and unmistakable language from the testator to the effect that his intention is to preserve the trust, and the holding of the property by trustees for the benefit of Miss Jordan for the period of her natural life, whether she live beyond January, 1928, or die before that date. Moreover, the testator gives explicit instructions as to what shall be done provided his niece happens to die be-

fore 1 January, 1928 (Item 8, Rec., 11), it being apparently unnecessary to say what shall follow her living beyond that date, since the trust for her benefit is to exist during the entire period of her natural life.

This trust is separable from the others.

The only question to be considered is whether this independent trust may be so separated from the rest of the will that it can be upheld, notwithstanding that the other trusts of the will are found to be illegal. As to this point there seems scarcely room for doubt.

The legacy to Miss Jordan is not "essential to the general scheme." See language of the Court in *Manice vs. Manice*, 43 N. Y., 307. It is an independent bequest, having nothing whatever to do with the tying up of the real estate in other parts of the will.

If effect cannot legally be given to the entire will, or to an entire provision in a will, any part of it may be sustained which is conformable with the rules of law, provided it can be separated from the residue without doing violence to the testator's general intention. *Oxley vs. Lane*, 35 N. Y., 349.

There may be separate trusts, or there may be a single trust that has more than one purpose. If one of these purposes be good, the courts will sustain the will to this extent, although another purpose, being in violation of the statute, fails. *Harrison vs. Harrison*, 36 N. Y., 54. A good illustration is seen in *Tiers vs. Tiers*, 98 N. Y., 568. The rule is familiar that Courts will use every effort to sustain a will and carry out a testator's intention, where it can be done by separating what is legal from what is illegal.

Per Allen, J., *Van Schuyver vs. Mulford*, 59 N. Y., 432.

"Where an estate is vested under a will in a trustee upon several independent trusts, some of which are legal, while others are in contravention of the statute regulating uses and trusts or the statute against perpetuities, the estate of

the trustee will be upheld to the extent necessary to enable him to execute the valid trust, and will only be void as to the illegal or invalid trust."

The question is a practical one whether the testator's directions with respect to the trust for the benefit of his niece present the features of a lawful, or of an unlawful trust. Inasmuch as the gift to Miss Jordan has nothing to do with the devise to the others, but is a distinct and independent gift for the lifetime only of the *cestui que trust*, there is no reason why the testator's intention should not be carried into effect.

II.

The Court was without Jurisdiction to Pass Upon the Validity of the Trust.

The decree of Judge Barnard declaring void the provisions of the will creating a trust respecting lands in the District of Columbia (Rec., 24) was a nullity. The Court had no right to proceed with the suit. It should have dismissed the bill for want of jurisdiction.

Our brief in the Court below raised this point, but the Court declined to consider it. We were ready to show that the devise in trust did *not* violate the statute against perpetuities; and, moreover, that Judge Barnard had no jurisdiction to entertain the suit.

But the Court of Appeals declined to hear argument, on this point. The Court was of opinion that while "the suit was indeed an extraordinary one," this appellee had no direct interest in the question of the validity of the general trust which rendered its determination necessary or even proper.

We can not but think that the Court below in reaching this conclusion fell into error. One of the reasons set forth in the bill of review for affording relief to the complainant

is found upon page 5 of the Record; "because said Court had *no jurisdiction* upon the merits of said case, and for that reason said bill should have by said decree been dismissed."

The prayer of the bill of review is that said final decree may be reviewed and *set aside* and no further proceedings be had thereon. (Rec., 6.)

It is always open to show that a decree complained of was rendered by a court that had no jurisdiction to render it. True, in one aspect of the appeal, it may not have been *necessary* to decide the question of the jurisdiction of Judge Barnard's Court, since the decision could be placed upon the ground that the trust for Miss Jordan is separable from the other trusts of the will. But the decree improvidently entered by Judge Barnard is likely to lead to trouble and must prove a trap to the title-searcher. At some future day the question of its validity is sure to come up. Now is a good opportunity to set to rest any doubts by an authoritative declaration on the subject.

Besides, Dr. Kearney's express intention ought to be sustained if the court shall be of the opinion upon examination that the provisions of his will in the premises are valid.

The Court of Appeals has said: "All of the parties whose interests were directly and materially affected by that part of the decree have not only acquiesced in it, but have appeared in this Court also in its support."

Of course, Mrs. Vertner, the heir-at-law, acquiesced in it, for she had everything to gain by so doing. But Dr. Kearney meant that this real estate should be preserved for a period of years during the lifetime of the grandchildren, so that they could rely on its proceeds for support. The wishes in the premises of these grandchildren could not be effectually placed before the Court, since they were represented by a guardian *ad litem*. There is urgent reason, therefore, that this mistake be corrected, to the end that the true effect of Dr. Kearney's devise be announced by a Court, upon

argument of counsel, and after full opportunity for a deliberate expression of the Court's opinion of the law.

We propose to dicuss the grounds for holding the decree to be void. There are two reasons and to some extent they are bound up together.

1. The bill on its face discovers a doubt as to the existence of a trust. Unless the existence of a trust is declared in positive terms, a court of equity has no right to proceed with the case.

2. The trustee applied to the Court for an expression of opinion as to the validity of a trust, and for nothing else. He sought no direction for the enforcement of the trust. A court of equity will not entertain a suit whose sole purpose it is to obtain the construction of a will.

I.

The bill did not allege the existence of a trust. Such allegation was necessary to give the Court jurisdiction.

There is no inherent power in equity to construe devises. *Mellen vs. Mellen*, 139 N. Y., 210.

Chancery deals with a will only by way of furthering the administration of some trust that the testator has created. It may be considered as settled law that the jurisdiction of equity in the construction of wills rests wholly upon the trusts which the will has brought into being. In other words, the general jurisdiction of equity over trusts finds something for a court of equity to *do* in respect to the trust features of the will.

Mr. Pomeroy pronounces this conception of the sources of jurisdiction in equity as to construction of wills to be "a doctrine which seems to be both in harmony with principle, and sustained by the weight of authority." *Equity Jurisprudence*, Sect. 1156.

He quotes the views of ALLEN, J., in *Chipman vs. Montgomery*, 63 N. Y., 230, as follows:

"It is by reason of the jurisdiction of the Courts of Chancery over trusts that courts having equitable powers as an incident to that jurisdiction take cognizance of and pass upon the interpretation of wills. They do not take jurisdiction of actions brought solely for the construction of instruments of that character, nor when only legal rights are in controversy. It is when courts are moved on behalf of an executor, trustee or *cestui que trust*, and to insure a correct administration of the power conferred by will, that jurisdiction is had to give a construction to a doubtful or disputed clause in a will, and the jurisdiction is incidental to that over trusts."

This language is employed in a case where an heir-at-law undertook to maintain an action in equity to obtain construction of a will, the Court holding that he had no right to maintain such a suit. In a later case, PECKHAM, J., after reviewing the decisions, says:

"The jurisdiction of courts of equity in construing doubtful or disputed clauses in a will has been held with entire uniformity by the Courts of this State to result from its jurisdiction over trusts, and that exists only when the Court is moved on behalf of an executor, trustee or *cestui que trust*, and to enforce a correct administration of the power conferred by the will." *Anderson vs. Anderson*, 112 N. Y., 110.

A recent text-writer upon the subject of wills has stated the law in similar terms, namely, that the power of equity to entertain an action for the construction of a will rises wholly out of the jurisdiction over trusts. *Underhill on Wills*, Sect. 455.

It may be well to refer to what Mr. Pomeroy conceives to be "a broader and different doctrine" for sustaining the right, in a small group of cases. He says:

"The broader doctrine is that the jurisdiction rises from the complicated character of provisions in a will; from the difficulty in understanding their meaning, or the doubt and

uncertainty as to the rights and interests of the parties claiming under them. In short the jurisdiction exists and is exercised whenever its terms are really difficult or doubtful, or their validity is contested without reference to the presence or the absence of any trust."

This language does not yield much satisfaction upon close inspection. It amounts to saying that courts of equity, in States where the "broader doctrine" is maintained, take jurisdiction of the construction of a will when the language of a testator really needs interpretation. The necessity of resort to a court of equity is thus made a reason for the assumption of jurisdiction by the court in the premises.

Of the cases cited by Mr. Pomeroy to sustain the text, we have found only one, *Baldwin vs. Bean*, 59 Me., 481, that, as we conceive, supports this view. This case involved the meaning of a statute providing that the court should have jurisdiction as a court of equity to determine the construction of wills. The Supreme Court of Maine, after some doubts, arrived at the conclusion that the legislature meant that parties in interest should have the right to take the opinion of the Court as to the legal effect of a will, even in advance of any actual controversy.

Other authorities cited will be found to be instances where the courts of equity in that particular State have been invested with all the powers of the High Court of Chancery of England, including the administration of estates. We are unable to agree with Mr. Pomeroy that the difficulties and doubts contained in a will are sufficient for the taking of jurisdiction by the courts in these cases. An examination of the report in each case will disclose the fact that under the Constitution of the State, courts of equity had been invested with full powers; and the court that Mr. Pomeroy refers to was of opinion that the establishment of a probate court had not taken from the equity

court its jurisdiction over the administration of trusts. In this country the rule is that the Probate or Orphans' Court has full power of administration. At any rate, the "broader doctrine" class does not include the District of Columbia; and it is not needful further to consider it.

The equity powers of the Supreme Court of the District of Columbia are those possessed by the Maryland Court of Chancery, 27 February, 1801, that is to say, the powers of the High Court of Chancery of England, save so far as the institution of probate courts had shorn our courts of chancery of jurisdiction over the administration of estates. See language of the Court in *Ferris vs. Highley*, 20 Wall, 382.

The jurisdiction of the Supreme Court of the District of Columbia to construe a will, therefore, grows out of the trust created by the testator. It can be referred to no other source.

No statute against perpetuities in District.

The decree declares the provisions of the Kearney will to be "contrary to the statute in such cases made and provided." (Rec., 24.) No statute in the premises was in force in the District at the date of the decree. The Maryland Statute of Wills, of 1798, does not meet the language of the decree. It provides that "no will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation or appoint to any uses not permitted by the constitution or laws of the State." *Ould vs. Washington Hospital*, 95 U. S., 308. Had a statute existed in the District of Columbia, in 1877, when the Ould case was decided, that governed perpetuities, it would have been cited in the opinion; but SWAYNE, J., after discussing the statute of Elizabeth in regard to charities, concludes with this pertinent remark: "The controversy must be determined upon the general principles of juris-

prudence, and the presence or absence of the statute cannot affect the result" (p. 310).

What was in force in the District when Judge Barnard entered his decree was a restriction created by judicial decision; and the "statute-made-and-provided" clause of his decree must, therefore, be regarded as inadvertently admitted. The period, let us add, is a life or lives in being and twenty-one years, with a fraction of a year added for the term of gestation, in cases of posthumous birth.

No need to have will construed.

Dr. Kearney had devised real estate in the District of Columbia, to Taylor and Drake, trustees, upon trusts clearly set forth. There can be no doubt as to the meaning of the testator's language. Nobody needed to ask a construction of the will, in the sense of ascertaining what the testator intended by his words.

Judge Drake, describing himself as the sole trustee under the will, applies to the Court asking that the will be construed. In a half-hearted way this trustee complains of having been advised that the trust is void, and he says that he would like to have the Court tell him whether or not the trust provisions are valid. On the face of the pleadings doubt is raised by the trustee himself whether any trust has been created by the will. Unless there be a trust a court of equity has no jurisdiction to enter upon a consideration of the case made in the complaint. A complaint, setting out a will, and asking that a construction be given to it to see if it creates a trust, does not state facts to give equity jurisdiction. *Edgar vs. Edgar*, 26 Oregon, 65.

So, where a plaintiff takes certain clauses of a will containing trust provisions, and seeks to have them declared invalid, the suit does not give an equity court jurisdiction upon the ground that a trust is involved. *Jones vs. Rich-*

ards, 54 N. Y. S., 126. Chancellor WALWORTH stated in the leading case of *Bowers vs. Smith*, 10 Paige, 200, (1843) that he was "not aware of any case in which an heir-at-law of the testator, or a devisee who claims a mere legal estate in the real property, where there was no trust, has been allowed to come into a court of equity for the mere purpose of obtaining a judicial construction of the provisions of the will."

These authorities abundantly show that it is necessary for a court of equity first to be assured that the subject matter of a trust is before it in order to warrant its proceeding to take jurisdiction.

Trustee had no right to file his bill.

By accepting the trust and entering upon its duties, Judge Drake took upon himself the responsibility of defending the provisions of the will as to real estate in the District of Columbia. A trustee must always defend his trust. *Perry on Trusts*, Sect. 433; *Ellis vs. Barker*, 7 Ch. App., 104. Upon accepting the office of trustee, it became the duty of Judge Drake to protect the estate against any person who should deny the validity of the trust. The heir-at-law, being the person chiefly interested to defeat the testator's purpose, had her remedy by ejectment.

At page 5 of the record will be found Section *c* of paragraph 9 of the bill of review. This section is a statement of one of the particulars in which complainant avers that the decree was erroneous. The language of Section *b* is as follows:

"Because the institution of the said suit by the said trustee under said will was a breach of his said trust and of the confidence reposed in him, whose duty it was to defend the title and interest of the *cestui que trust*, Gabriella K. Jordan, thereunder, and a court of equity cannot lend its aid to the commission of said breach."

The Court will observe that the bill of review is signed by another solicitor than ourselves. If the record were extended it would show that after we had come into the case in the place of the former counsel, we consented that Section *b* be stricken out of the bill. We did this because we believed that Judge Drake had no thought of violating his duty as trustee.

Section *c* of that paragraph, however, remained in full force:

Because said Court *had no jurisdiction* upon the merits of said suit, and for that reason said bill should have by said decree been dismissed. (Rec., 5.)

This act of the trustee, extraordinary in its nature and unknown to the practice of equity respecting trusts, was such that the court ought not to have taken jurisdiction.

Bearing in mind that the substance, and not the form of a proceeding of this character is to be regarded, we point to the language of the court in the carefully considered case of *Chipman vs. Montgomery*, already cited. That was an action brought by heirs-at-law and next-of-kin for the construction of a will. The court said that it was in reality an attempt to obtain possession of real property without resorting to an action of ejectment. The chief point in controversy was the validity of a residuary devise.

After announcing that the court was without jurisdiction, because an heir-at-law has no right to apply to a court of equity for the construction of a will, his claim being contrary to the will, the Court proceeds to discuss the principle that a party who contends that a trust in the will is invalid cannot resort to an alleged existence of that trust for the purpose of deducing therefrom the right of a court of equity to take jurisdiction. ALLEN, J., says:

"It is true that counsel for plaintiffs, while alleging the invalidity of the residuary clause of the will, did claim that

if it was valid a trust was created in which they have a remote and contingent interest; and that by reason of such trust the Court had jurisdiction of the action, and that as an incident of that jurisdiction could pronounce on the validity of the clause creating the trust, and adjudge them entitled as heirs-at-law and next-of-kin to the destruction of the trust and the overthrow of the entire will. The plaintiffs cannot entitle themselves to the intervention of the instrument while occupying such a position. They cannot for the purpose of giving the Court jurisdiction, allege a trust within the general powers of the Court, and in the same breath deny the legal existence of that same trust, and insist upon legal rights inconsistent with it. The trust being invalid, the Court cannot entertain jurisdiction of the other matters. If the trust attempted to be created by the residuary clause of the will is legal, then there can be no need of a judicial construction of the instrument, for no question is made as to its true meaning or the rights of the parties. If it is invalid, as in contravention of the statute against perpetuities, then the rights of the parties are purely legal and are to be enforced as such." 63 N. Y., 231.

The reasoning is here applied to the case of an heir-at-law who confessedly had no rights under the will. A like reasoning, however, is pertinent in the case at bar. Although we have in our case a trustee expressing his doubts as to the validity of the trust, and asking the court to say whether the trust be valid or not, the action (if it can be maintained at all) must be regarded as having been brought in the interest of the heir-at-law; for the only result of pronouncing the trust void is to favor the heir-at-law.

Consequently, even if it be conceded that he can maintain such an action, the trustee is to be constrained by precisely the same considerations as those named in the extract just quoted. In *Chipman vs. Montgomery*, as well as in the present case, the rule obtains that no one, whether heir-at-law or trustee, can allege a trust and deny it at the same time. We see that an expression of doubt by the trustee,

supplemented by outright denial on the part of the heir-at-law as defendant, brings this case into the same posture as that commented upon by the Court in *Chipman vs. Montgomery*.

The suit was really that of the heir-at-law.

Besides, the record shows that while Judge Drake brought his suit nominally as trustee, the suit was really that of the trustee and heir-at-law combined. Only one counsel appears, who is the solicitor for the complainant. He files the bill and the answers on the same day, namely, May 15, 1900 (Rec., 7). Mrs. Vertner, the heir-at-law, swears to her answer 14th April, 1900 (Rec., 22), more than a month *before* the date of the filing of the bill. These dates mean that the trustee himself must have either prepared the answers in advance of filing the bill, and submitted them to the defendant; or, agreed with the heir-at-law, so that there was no real contest.

The question of the validity of the trust is a question of law with which a law court can promptly deal. All persons interested to defeat a trust under a will have their plain, adequate and complete remedy at law.

The trustee could move in the direction only of having the trust sustained and of asking the court for directions in respect to its enforcement. Had Judge Drake proceeded upon the theory of a valid trust, and asked the court for directions, as to any specific conduct by him, the court could properly have taken jurisdiction, however it might turn out afterwards as to the validity of the trust. The decree of the court in that event, even if incorrect, would have been voidable, not void. But such is not this case. The trustee only by inference alleges the existence of the trust. In the same breath he confesses to a doubt as to whether the trust be good or not. Taking such a position is equivalent to a non-allegation of the existence of a valid trust. It follows that there was not a sufficient allegation in Judge Drake's bill of the facts necessary

to bring the case within the jurisdiction of the Court. What purports to be a decree, therefore, is null and void.

2.

Courts will not entertain a suit merely for construction—with no direction to trustee.

A fatal defect in the decree is that it contains no direction to the trustee. A court of equity will not entertain a suit by a trustee unless he prays to have something done by way of administering the trust. It will not move to interpret a will and do nothing else. *Bailey vs. Briggs*, 56 N. Y., 406. The bill must specify some relief that is prayed for, and not merely ask the court what is the meaning of the words of a will. *Pomeroy Equity Jurisprudence*, Sect. 1156, and cases cited.

A bill in equity cannot be maintained simply to establish the fact of a trust, no other relief being sought, even when its existence is denied. 1 *Perry on Trusts*, Sect. 17. "We do not think", remarks the Chief Justice, in *Bailies vs. Payson*, 5 Allen, 488, "the mere declaration of a trust, when it consists merely of deciding that a certain contract has been made, and that it creates a trust, is a sufficient ground for maintaining a suit."

Two decisions in New Jersey are of similar import.

"In no case has it been asserted that the court may be asked and compelled to construe a will except as an incident to some relief which may be afforded by a decree. It has been expressly held that the court will not construe wills for the sake of giving counsel and advice to the parties; but only for the purpose of giving positive directions for the action of the trustees." Per MAGIE, Chancellor, *Hoagland vs. Cooper*, 65 N. J. Eq., 410.

Such is the language of the Court in 1903. As late as 1905 a bill came before the learned Chancellor, which

simply set forth a copy of a will, and asked the opinion of the Court as to the effect of the will upon certain after-acquired property. In dismissing the bill the Chancellor said:

"The purpose of the bill is to obtain the construction of a will with respect to the title to real estate. The only decree would be to express my opinion upon the meaning of the will in question." *Held*, no jurisdiction to construe the will. *Bevan vs. Bevan*, 59 Atl. Rep., 896.

The complaint, to obtain the construction of a will, must show that the complainant is entitled to and must pray some relief dependent on the construction desired. A suit does not lie merely to obtain the opinion of the Court. *Cory vs. Fleming*, 29 Ohio St., 147.

The *ratio decidendi* of these cases is obvious. Powers of a court of equity are not to be invoked except there is some duty for the trustee to perform. If a party seeks to ascertain the existence of a trust he will find a court of law amply equipped to enlighten him. If, however, a party asserts the existence of a trust, and needs direction for its administration, he can properly resort to a court of equity. The distinction between these two undertakings is clear. Judge Barnard had no right to enquire whether a valid trust existed under the will, and there stop. Such a right a court of equity enjoys only when it has been expressly conferred by legislative sanction.

The power of a court of equity in respect to trusts, as we have just seen, is restricted in its exercise to orders of an administrative or directory character. Its decree would necessarily contain a mandatory clause. A mere declaratory decree, expressing the opinion of the Judge as to the validity of a provision of a will, unaccompanied by a direction to the trustee what to do in the premises, is unknown to the equity practice of the Supreme Court of the District of Columbia.

For this further reason the decree (Rec., 24,) is null and void, since the Court had no jurisdiction to enter it.

III.

All the Trust Provisions of the Will are Valid.

At the outset the Court (Barnard, J.,) fell into error in determining that the provisions of Dr. Kearney's will violate the rule against perpetuities. We contend that every trust in the will is perfectly good. No one of them was meant to be continued longer than the lifetime of persons living at the date when the will was made, and when it went into effect.

Dr. Kearney "tied up" his estate, it is true ; but he did it for no longer a period than the lifetime of the beneficiary. The testator laid down wise and provident directions, the object of which was to guard young persons against loss from inexperience in taking care of property.

Had the question involved been argued of counsel, and had the case not presented the features of an amicable suit, it is probable that the learned Judge would have examined the law points involved, with the degree of care that a question of perpetuities often requires, and would have reached the conclusion that the trusts were legal.

The error into which the Court fell resulted from an assumption it would seem that because the testator had provided that a trust of realty shall continue till 1 January, 1928, it necessarily follows that the period may exceed lives in being and twenty-one years, and hence that the devise is void.

Where a future date is fixed when the trust is to end, and the estate to vest, a proper means of ascertaining its validity is to enquire whether, in the absence of an express reference to the lifetime of the beneficiary, the object of

the trust renders it needful that the trustee hold the estate longer than the lifetime. Had such an inquiry been prosecuted by the trustee, Drake, or by the Court, it would have appeared plain that in no single instance does the testator require the trust to be continued for a period longer than the lifetime of the *cestui que trust.* Upon the death of each living beneficiary, that particular trust ceases; and that too, wholly irrespective of the date designated (January, 1928,) for its termination, should the beneficiary so long live.

May not the Court have been led into error by overlooking the circumstance that no cause existed for requiring a trust to continue for the benefit of a grandchild, longer than for the life of that grandchild? The contingency that the death of Thomas K. Vertner, for instance, might happen before 1928, does not appear to have occurred to the learned Judge; and he did not take into account what effect such event would have had under the language of the will upon the further continuance of the trust in behalf of T. K. V.

"Where no intention to the contrary appears, the language used in creating the estate will be limited and restrained to the purposes of its creation, and when they are satisfied, the estate of the trustee ceases to exist and his title becomes extinct. The extent and duration of the estate are measured by the objects of its creation." Per SWAYNE, J., *Doe vs. Considine*, 6 Wall., 458; *Young vs. Bradley*, 101 U. S., 788.

A will need not *in express terms* provide that the particular trust for each of the beneficiaries shall cease upon his or her death. It is enough that a necessary implication exists that such was the testator's intention.

What Dr. Kearney really did was to devise to his trustees that they might hold the property, collect the rents and use the income for the support of the respective bene-

ficiaries until 1 January, 1928, provided, of course, that *the beneficiary so long lives.* Mrs. Vertner has died. The trust for her benefit ended at her death. Every trust Dr. Kearney creates ceases with the life of the *cestui que trust*, if not before.

In New York, where the law against the restraint of alienation is rigid, and where frequently trust provisions have been set aside as violative of the statute, some cases have arisen where the intention of the testator that the trust should not continue longer than the lifetime of the beneficiary has been gathered from the words of the will, and the trust sustained. See *Montignani vs. Blade*, 145 N. Y., 111, where the Court at special term held the gift void, on the ground that there was a fixed term of ten years before vesting. The general term, however, sustained the trust, and its decision was affirmed by the Court of Appeals. The testator had given certain shares of stock to his son, B., with limitations as follows:

"To be held in trust by my executors ten years from and after my decease, then to be delivered and transferred to him; if deceased, do and continue the same to his son, W., now in his eighth year of age. The dividends shall be collected when and as declared by my executors until transferred and delivered and paid to my son, or if deceased, to his son, W.; if both are deceased before the ten years have expired, then transfer and deliver the said shares to my daughters, L. and M., etc."

As stated by FINCH, J., the suspension was not for an arbitrary period. "In substance, the trust is for two lives or a shorter period, and cannot in any event exceed their duration."

A case in California is in point. The testator in a codicil used the following language:

"The $5000 to my niece, J. G., to be held in trust by

my executors for her benefit, and the interest is to be paid her monthly; at her death the same to be continued to her two children, H. and M., until they are each twenty-five years of age, when the $5000 shall be paid to them, share and share alike."

The court below, upon application of J. G., ordered that the $5000 be paid to her absolutely, upon the ground that the trust was void. Upon appeal the court reversed this order and held the trust to be good.

"It matters not whether it be by express terms or by necessary construction that lives in being measure the duration of the trust. If it appear with certainty that the trust cannot longer continue the law against perpetuities is not violated. Thus a trust in property to pay the income to A. until he arrives at the age of forty years, would not violate the law, for every trust of necessity ceases when there is no beneficiary; and in the case instanced, it is obvious that A.'s life is the ultimate and determinative measure of duration. In no event can the trust continue longer than his life. Upon his death, before reaching the age of forty years, the trust determines for lack of a beneficiary." *Estate of Hendy*, 118 Cal., 659.

Let us for a moment examine the provisions of the will creating a trust in favor of Thomas K. Vertner, as indicating the testator's meaning in respect to each of these trusts for the grandchildren; for they are alike as regards their period of duration. All are for the lifetime of the *cestui que trust*, should the beneficiary die before January 1, 1928.

The directions amount to this: the estate that is to vest in T. K. V., *if it vest at all*, must vest in the lifetime of T. K. V., because it is given to him and to him alone. It is absurd to imagine that the testator meant that possibly the trustees shall hold the title for years after the death of T. K. V., in order that a vesting may take place in T. K. V., 1 January, 1928.

A reasonable meaning must be given to the language of a will. Dr. Kearney devised to trustees to hold till 1 January, 1928, if T. K. V. so long lives, *i. e.*, substantially the vesting, if it occur at all, must by the terms of the devise occur in the lifetime of T. K. V. If T. K. V. dies before 1 January, 1928, the trust ends by its terms at such decease.

Had there been a gift over to some other person than T. K. V., this interpretation of the testator's meaning would still be admissible; but the fact of the possibility of the death of T. K. V. within the period might have invalidated the gift over. The devise being to T. K. V. himself, there is no room for a conjecture that the testator designed the gift to take effect, irrespective of the date of T. K. V.'s death. In other words, the vesting is by the terms of the will to take place in T. K. V.'s lifetime, or not at all.

The test laid down by Gray is, "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." *Gray on Perpetuities*, Sec. 201.

If this share of the estate shall vest in T. K. V. under the will, it must do so, *if at all*, in the lifetime of T. K. V.

The rule against perpetuities is not a rule of interpretation. We first seek to ascertain what is the testator's purpose, and then look to see if the will offend against the rule of perpetuities.

This common-sense method of dealing with a will preserves in many instances a devise, where it occurs that, as a matter of fact, the testator has had no purpose in mind of offending against the rule. Such is the case with Dr. Kearney, and we respectfully submit that in no instance does his will violate the rule against perpetuities.

The Appellants' Points.

A word or two in reply to the elaborate argument of counsel for the appellants. It rests on the foundation that the testator actually intended to tie up his Washington real estate until 1 January, 1928, "absolutely, and at all events." Note the following extract from their brief.

"The trust * * * was * * * intended for the purpose of conserving this property and holding it together for a fixed period without reference to consequences (p. 20).

"Dr. Kearney plainly provides for the continuance of the trust absolutely and at all events until the expiration of the gross term" (p. 44).

"No one can read the emphatic unqualified language in which the testator provided for the continuance of the trust and doubt that he intended it to continue at all events until the expiration of the fixed term" (p. 50).

"* * * That intention being that the trust should continue at all events" (p. 50).

Counsel appear to have overlooked a few significant words in item 5.

The testator directs the trustees to hold the property, for a wise purpose, until 1928—"Subject, however, to the conditions and limitations hereinafter imposed." (Rec., 9.)

Here is a qualification of the extent of the trust. The object is to provide for the support of children, and for the property vesting in each child at a future day. What, if the child dies? What, if all the children, their mother, and Miss Jordan, all die before 1 January, 1928?

Is it not obvious that each individual trust terminates upon the death of the *cestui que trust* before 1 January, 1928, should that event occur? Is not the trust subject to the condition that each beneficiary shall live till that date? Most assuredly, yes.

Counsel ignore this limitation. They impute to Dr. Kearney a rigid purpose to have the trust continue till 1

January, 1928, *at all events*,—even if no beneficiary shall be in existence to enjoy the income of it.

The will does not say that the trust shall continue *absolutely* till that date. True, the possession and control of the property is to be "full, free and absolute" in the trustees until 1 January, 1928. But this quality of ownership is an entirely different thing from a provision requiring the property to be held *absolutely* and *at all events* until that day arrives.

Counsel are determined to impose an intention upon the testator at all hazards, even though the effect of his language is to bring us to a totally different conclusion. After informing the Court that our argument as to the death of a beneficiary is "fatally defective" (p. 49) they cite authorities to the following proposition: "The *intention* must first be ascertained and then the rule remorselessly applied." Precisely what "rule" is meant is by no means clear, but counsel at least proceed to apply their "rule" remorselessly, as witness this language:

"Applying these principles to the case at bar we see that the question is, not whether the trust would or must in fact terminate with the lives of the persons referred to, but whether the testator *intended* it so to terminate. If he did not so intend, but on the contrary intended that it should continue at all events until 1928, then the provision is void under the well settled principle just referred to irrespective of the question whether it would actually terminate before that period."

If the trust *must* in fact, from the terms of the will, "terminate with the lives of the persons referred to," how is it possible to deduce from those terms any other intention than that plainly conveyed by the words? If Dr. Kearney's words mean—*must* mean—an ending of the trust by the death of the beneficiary, how can counsel expect his assertion that the testator intended something different is going to persuade the Court to pronounce void this modest provision for the life of a favorite niece?

Dr. Kearney's intention is perfectly plain. He meant, that his "beloved niece," come what may, should be paid regularly and punctually $40 a month, even if it should take all his real estate in the District of Columbia to furnish it. Miss Jordan has been for a long period left out of this stipend. Now while answering these appellants, she learns that for her to receive this monthly payment out of an estate which counsel informs the Court is "worth possibly a quarter of a million of dollars" (p. 51) is to inflict the "grossest wrong" on the grandchildren, and subject the title to probable "deterioration, damage and loss" (p. 52). In spite of counsel's fears in case of "fire, earthquake or other misfortune," we still think that Dr. Kearney intended that Miss Jordan should have $40 a month, and that the trust in her behalf is independent of the trust for the grandchildren.

What matters it if all the real estate in the District of Columbia is held in trust to ensure the payment of the small sum of $40 per month? Courts have nothing to do with considering the size of an estate and the comparative size of a benefit derived therefrom by a *cestui que trust.* It is of the most vital importance to Miss Jordan that she punctually gets this monthly payment. She has been kept out of it long enough; and the very fact that an accumulation of back annuities must now be paid to her demonstrates the wisdom of Dr. Kearney in making this payment a charge upon his entire realty in the District.

We do not deem it needful to discuss the pertinency of the authorities cited in an attempt by counsel to show that the trust in behalf of Miss Jordan is not separable from the general trust. It is contained in a separate clause, is embodied in different language, and constitutes an entirely independent provision, designed to accomplish a result not elsewhere set forth in the will.

Counsel is pleased to argue that the direction to the trustees to pay over to Miss Jordan regularly each month

the rents of 611 M Street, an income of $40 per month (the trustees to add a sufficient amount to make up $40, if the rent is less than that sum) "does not create a trust for Miss Jordan" (p. 25). She is simply, so the argument proceeds, "one of a number of beneficiaries to whom a portion of the income from the trust is to be paid monthly." (P. 25.)

They forget that the trustees are to administer this particular trust "*during the natural* life of my beloved niece;" and that certain property is set apart, and taken out of the general trust, the income of which property they are to pay over to her. Holding for the life of Miss Jordan, the trustees are not at all affected by the arrival of 1st January, 1898. They are to hold the property for her benefit so long as she lives separate and distinct as trustees for her.

Objection is made that the question of want of jurisdiction in Judge Barnard's Court cannot be raised upon a bill of review. This is true where the sole object of the bill of review is to have the decree complained of declared void for want of jurisdiction. But our bill seeks to have the trust declared valid. We have raised the point of want of jurisdiction in order to meet the argument of appellants that the trusts are void. If they are really void, Judge Barnard should have dismissed the bill.

Counsel cite *Heald vs. Heald*, 56 Md., 300, and *Neale vs. Davies*, 5 De G. M. and G., 258, to sustain the position that the trustee, Judge Drake, had the right to come into a court of equity, saying he had doubts whether he was a trustee or not, and asking to be advised if the trust be valid. The doubt entertained by the plaintiffs in the cases cited was whether they should execute a particular trust, not whether they were trustees or not. In the *Neale* suit the bill was filed against trustees, not brought by a trustee, as in the case at bar. In the Maryland case the trustee asked the Court to instruct him as to his duties. Judge Drake, on the other hand, merely enquired whether the clause of the will making him a trustee was valid. He sought no instructions.

Argument is advanced that Judge Drake alleged the existence of a trust, and then registered "directions whether said existing trust is lawful" (p. 48). The allegation of the bill was that questions had arisen as to the validity of the provisions of the will relating to real estate in the District of Columbia, and he had been advised that said provisions were void. Yet appellants complain that our contention that the bill fails to allege, or throw doubt upon, the existence of a trust, is "contrary to the facts" (p. 47). We fail to perceive how a trustee plaintiff can allege the existence of a trust, and in the same breath assert that its validity is doubtful.

Counsel object that we may not ask a modification of Judge Barnard's decree. They assign as a reason that we took no cross appeal from the decree in this suit below and therefore cannot be heard in opposition to the decree of the lower courts. We are not opposing that decree, we ask its affirmance; but we say that this Court can go further, and in order to prevent litigation and to protect titles may express an opinion upon the validity of the trusts in Dr. Kearney's will and direct that the Equity Court by its decree modify Judge Barnard's decree to the extent of upholding those trusts.

The salutary principle of equity that when a court has acquired jurisdiction for one purpose, it may go forward, and do complete justice, is not unavailable here. Miss Jordan greatly prefers that Dr. Kearney's will be sustained in its entirety. If counsel for appellants are right in maintaining that the trust in her behalf is not separable from the general trust, we shall insist that the general trust is perfectly legal and valid, and ask the Court so to determine.

We respectfully submit that the decree of the Court of Appeals be affirmed with costs, and we trust that this Court will likewise declare all the trusts of the will to be valid.

CHARLES F. WILSON,
FRANK W. HACKETT,
For Appellee.

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JAMES H.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1906.

No. 179.

CHARLES S. LANDRAM AND JOHN A. BRODDUS, EXECUTORS OF CONSTANCE K. VERTNER, DECEASED, AND LILLIE K. VERTNER, *Appellants.*

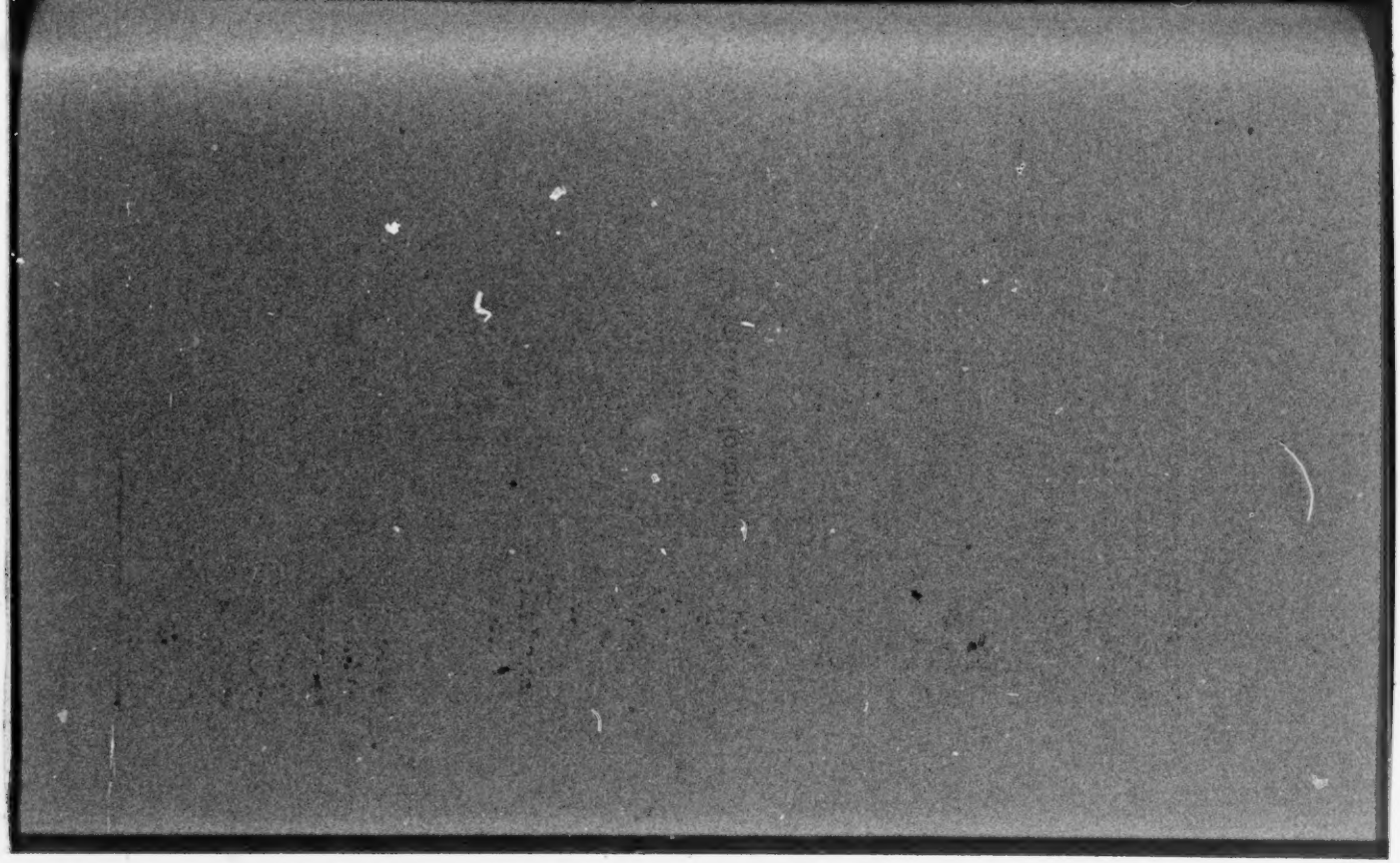
vs.

GABRIELLA K. JORDAN.

BRIEF ON BEHALF OF PETITIONER.

Mary B. Kearney.

FRANK SPRIGG PERRY,
Counsel for Petitioner.



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vs.

GABRIELLA K. JORDAN.

BRIEF ON BEHALF OF PETITIONER.

On October 29, 1901, Gabriella K. Jordan, the appellee herein, filed a bill of review in the Supreme Court of the District of Columbia, praying that the court review and set aside a former decree passed June 27, 1900. (Rec. 1.) The original suit was for the construction of the will of Thomas Kearney, who died in Texas, on July 4, 1896. In the original suit Elijah S. Drake, Trustee, was the Complainant, and the Defendants were Leroy M. Taylor, Trustee, Gabriella K. Jordan and the daughter and grandchildren of the testator. The decree of June 27, 1900, declared void certain provisions of the will of Thomas Kearney, devising real property in Washington, D. C., among others, that by which property was conveyed to Gabriella K. Jordan. (Rec. 24.) All of this property then vested in the heirs at law of Thomas Kearney. At the time of his death Thomas Kear-

ney left two children, Edmund Kearney and Constance Kearney Vertner. Edmund Kearney died on June 4, 1898, intestate as to this Washington real estate, and left surviving him the sister, Constance Kearney Vertner, and his widow, Mrs. Mary B. Kearney, the petitioner herein. Your petitioner, Mrs. Mary B. Kearney, is interested in the present suit to the extent of her dower rights of one-third of the property which descended to her husband, or a life estate of one-sixth of the total property in Washington, D. C.

PETITIONER A PROPER PARTY.

Upon a bill of review all parties in interest should be made parties defendant to the suit.

> "The legal object and effect of a bill of review being to have the decree examined and reversed, it was formerly held to be only against those who were parties to the original bill, (2 Barb. Ch. Pr. 94; Lube, Eq. Pl. 129,) in analogy to a proceeding in error. It was afterwards extended so as to embrace other parties in interest."
>
> *Friley vs. Hendricks,* 27 Miss. 412.

Quoted with approval in

Ralston vs. Sharon, 51 Fed. R. 703, 714.

The question of who are parties in interest has been fully discussed in many decisions in the United States Supreme Court.

> "The act says it shall be lawful for the Court to entertain jurisdiction; but, as is observed by this Court, in *Mallow vs. Hinde,* 12 Wheat., 198, when speaking of a case where an indispensable party was not before the Court, 'we do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever

may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's right, without the party being either actual or constructively before the Court.' "

Shields vs. Barrow, 17 How. 130, 140.

In the case of *Williams vs. Bankhead,* 19 Wall. 563, is found an example of an indispensable party without whom no decree could be made. It was contended that the widow of James H. Branch, who was not joined in the suit, was not an indispensable party because the only inconvenience arising from proceeding without her would be the double liability to which the defendant would be exposed. But the Court held that the suit concerned the disposal of a specific sum in which the widow claimed an interest and that she was an indispensable party.

Where the Complainants have no rights separable from or independent of the rights of persons not made parties, and where a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties, a court of equity will not proceed to a decree.

Mallow vs. Hinde, 12 Wheat. 193, 198.
Cameron vs. McRoberts, 3 Wheat. 591.

Can this Court in the case now before it render a decree between the Appellants and the Appellee which will do substantial justice and yet not affect the rights of your petitioner. Since the decree of June 27, 1900, petitioner has been entitled to one-sixth of the entire rents and revenues from the Washington property which was in the hands of the trustees. Should this Court affirm the decree of the Court of Appeals and the Supreme Court, District of Columbia, this interest of your petitioner, her dower in one-half of the property descended to her husband, will be reduced proportionately.

The dower right of petitioner is a valuable interest and is one which the law recognizes and protects. The fact that dower has not been assigned does not alter this proposition.

> "The lands, which descended to the children of Francis W. Shephard, her deceased husband, were charged with her dower right; and that is an interest which the law not only recognizes but protects, by giving the right to the claimant to maintain an action to recover it. The right, which was, inchoate in her, became, by her husband's death, a vested interest; and until, by assignment or satisfaction, that right is extinguished, she is entitled to stand with the present owners of the realty and to unite with them in asserting the right to restrain the continuance of the defendant's acts, by which the realty is said to be injured and its value impaired."
>
> *Shepard vs. Manhattan Railway Co.*, 117 N. Y., 446.
> See *Sykes vs. Chadwick*, 18 *Wall.* 145.
> *Rogers vs. Potter*, 32 N. J. L. 78.

Your petitioner was entitled to be made a party in the lower courts and to be heard. No decree can be made in this case without materially affecting petitioner's interests.

JURISDICTION.

The original bill in this cause, after praying for the issuance of the writ of subpœna against defendants and asking for the appointment of a guardian *ad litem* for certain infant defendants, contains the following prayers:

> "3. That by a decree of this honorable Court the last will and testament of Thomas Kearney, deceased, be construed so far as the same deals with the real estate within the District of Columbia therein devised.
> "4. That he shall have such other and further relief as the nature of the case may require." (Rec. 8.)

In the body of the bill it was recited that certain questions had arisen about the validity of the provisions of the will relating to real estate in the District of Columbia and E. S. Drake, the Complainant, alleged that he had been advised that the same were void because they attempted to create a perpetuity.

There is no question but what equity has jurisdiction over trusts created by a will, as well as in other cases of trusts.

22 Ency. Pleading and Practice, p. 23.

A trustee is not required to run any risk in the management of the trust estate and, if he is in doubt about his safety or security, he should apply to a court of equity for instructions.

Dimmock vs. Bixby. 20 Pick (Mass.) 374.

In no case does this obtain with greater force than in the case now before the Court. There was grave doubt whether the provisions of the will of Thomas Kearney created a trust or not. No agreement of the *cestuis que trust* could materially assist the trustees as several of the parties interested were infants. The aid of the equity court was properly sought by the trustee.

The case of *Heald vs. Heald*, 56 Md. 300, is directly in point. In that case a bill in equity was filed by a trustee named in a will. The Court held:

> "The bill further charges, that doubts have arisen as to the validity of certain trusts upon which the said investments have been made, and as to the rights of the several parties in such investments, and that the Complainant cannot safely proceed to execute the trusts of said will, without a judicial construction thereof, and an ascertainment of the rights of the several persons and classes of persons concerned.
>
> "It is not the province of courts to declare the rights of parties, except in cases where immediate relief can be given. If there is not matter in dispute, and the

application is to do nothing more, than *to declare further rights,* in such a case courts will not entertain jurisdiction.

"But this is an application by a trustee, under a bill, directed to make large investments upon certain trusts and limitations, in regard to the validity of which, and the rights of the parties in regard thereto, grave doubts have arisen. Under such circumstances, we are of opinion that he is entitled to the aid of this Court, to instruct him as to his duties, and to protect him in the discharge of them, now, and in the future emergencies of the family of the testator."

See *Woods vs. Fuller,* 61 Md. 457.

The common course may be for the trustee to decline acting without the sanction of a court of equity and to leave the cestui que trust to have recourse to the courts. But this method is not the only one open to the trustee and he can appeal to the equity court as party plaintiff in a suit affecting the construction of the trust. The question of whether a party should be made plaintiff or defendant is not material to an equity court, so long as such court has jurisdiction over the subject-matter of the suit.

Dimmock vs Bixby (supra.)

See

Woolsey vs. Dodge, 30 Fed. Cas. 18032.
U. S. vs. Pacific R. R. Co., 90 U. S. 607.
Piatt vs. Oliver, 3 McLean 27.

It is not proper on appeal to question the disability of a party to bring suit. An error of this kind is one which should be raised at the outset of a suit. A case in point is that of *Chicago vs. Cameron* 22 Ill. App. 91, 105.

"Even if the defendants in error, as stockholders, had not the legal capacity to sue, the rule is that the personal disability to sue, if apparent upon the face of the bill, must be raised by demurrer, and if it does not appear on the face of the bill, advantage must be

taken of it by a plea in the nature of a plea in abatement. Mitford's Equity Pleadings, Tyler's Edition, 245 and 318; Story's Equity Pleadings, 88, 493, 494; 1 Daniell's Chancery Practice, 52, 57, 84.

"There was in this case no demurrer or plea. Answer to the merits was filed. The question of the capacity to sue cannot be raised after a hearing on the merits or error."

An adequate remedy at law does not oust equity jurisdiction when an element of trust exists. It may that a court of law in some cases has jurisdiction over trusts; in some cases of trusts a statutory remedy may be given; but the jurisdiction of the equity court also obtains, and we find a concurrent jurisdiction.

(Reporter's Notes.) "3. In cases involving trusts the jurisdiction of equity is not dependent upon the absence of a remedy at law."

M'Campbell vs. Brown, 48 Fed. R. 795.
See *22 Ency. Pleading and Practice, p.* 14.
Hopkins vs. Grimshaw, 165 U. S. 342, 359.

PERPETUITIES.

The last will and testament of Thomas Kearney, of San Antonio, Texas, upon which this case arose, bears date of June 4, 1896, (Rec. 8). It was executed in the county of Webb, State of Texas, and was duly admitted to probate in that county. The testator at the time of his death on July 4, 1896, owned real estate in the District of Columbia of considerable value and also had in bank in the District of Columbia a sum of money amounting to about $14,000. By various elaborate and contradictory provisions the testator attempted to convey his property to two trustees to be managed and controlled by them until the first of January, 1928. The trustees named were Elijah S. Drake,

of Port Gibson, Mississippi, the Complainant in the original suit herein, and Leroy M. Taylor, of Washington, D. C. The parties for whom this trust was attempted to be created were the daughter, grandchildren, and niece of the testator. The original bill in this cause was filed May 15, 1900, and the decree rendered June 27, 1900. (Rec. 7 & 24). By this decree all of the will of Thomas Kearney relating to real estate in the District of Columbia was adjudged void as violating the rule against perpetuities. Miss G. K. Jordan had been made party defendant and had submitted a formal answer. She filed on October 29, 1901, a bill to review the decree of June 27, 1900, and this bill of review is now before the Court on Appeal.

We will consider in the first place whether the will violated the rule against perpetuities, and then discuss the question of the particular rights of the Appellee.

The Statute of Wills of Maryland passed in 1798 was in force in the District of Columbia at the time of the death of the testator and up to the time when the present code went into effect on January 1, 1902. The section relative to perpetuities provides "no will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation, or appoint to any uses not now permitted by the Constitution or laws of the State." 2 Kilty's Laws of Maryland, ch. 101, sub. ch. 1; Sec. 2. Abert's Digest, District of Columbia Laws, ch. 70, Sec. 2. The law in force since the Code went into effect is much the same and is found Sec. 1023, D. C. Code.

The leading case on the subject of perpetuities is that of *Ould vs. Washington Hospital*, 95 U. S. 304, 312, which case came to this court on a writ of error from the Supreme Court of the District of Columbia. In that case there was an action of ejectment and upon issue joined the case was submitted to the lower court upon an agreed statement of facts. One of the questions raised was that the devise of the

tract of ground mentioned in the will was void because it created a perpetuity. Mr. Justice Swayne delivered the opinion of the Court.

> "A perpetuity is a limitation of property which renders it inalienable beyond the period allowed by law. That period is a life or lives in being and twenty-one years more, with the fraction of a year added for the term of gestation, in cases of posthumous birth."
>
> * * * * *
>
> "The same rules generally apply to legal and equitable estates. They are alike descendable, devisable, and alienable."
>
> * * * * *
>
> "There may be such an interval of time possible between the gift and the consummation of the use as will be fatal to the former. The rule of perpetuity applies as well to trust as to legal estates. The objection is as effectual in one case as in the other. If the fatal period may elapse before what is to be done can be done, the consequence is the same as if such must inevitably be the result. Possibility and certainty have the same effect. Such is the law upon the subject."
>
> See *Hopkins vs. Grimshaw*, 165 U. S. 342, 355.

When a term in *gross* is taken, that term, if a term can be measured by years, is limited to twenty-one years. This is logically in line with the rule covering a life in being and twenty-one years thereafter, for, as we have seen above, the fact that the contingency may "*possibly*" happen outside the proper limits invalidates the trust. If there was a gross term of twenty-two years and the party entitled to the particular estate should die within the first year the property would not go to those entitled to the remainder until after the life in being and twenty-one years. This is recognized early in the Supreme Court of the United States.

> "It is the acknowledged rule, that an executory devise is not too remote, if the contingency may happen within a life or lives in being, or twenty-one years and a few months after. In the present case *the contingency must have happened within twenty-one years, at all events.*"
>
> *Barnitz's Lessee vs. Casey*, 7 Cr. 456, 469..

And for a further discussion of the rule applicable to a term in gross, see Gray's Rule Against Perpetuities, 2nd. ed., Section 223 and 185. Applying these rules to the case in hand. *By item 5* of will of Thomas Kearney, (Rec. 9.) we find as follows:

> "I hereby appoint them and their successors, as hereinafter provided, trustees for the purpose of managing all the real property in item 2 and 3 of this will, from and after my death continuously until the year 1928, subject however to the conditions and limitations hereinafter imposed, and devise to them, the said Dr. Leroy M. Taylor, of Washington, D. C., and E. S. Drake, of Port Gibson, Miss., and their successors, all and singular, the property mentioned in item 2 and 3 hereof, in trust for the uses and purposes and under the conditions hereinafter mentioned. Said trust to be continued in them and their successors until the first day of January, 1928. Said trustees and their successors to have full, free and absolute possession and control of the same until the date last above mentioned, with full power and authority to let and lease the same for said period, and to collect all rents and revenues accruing therefrom, with full power and authority to take all necessary steps either in or out of court to collect said rents and revenues and to protect and preserve said property; * * * ."

In item 7 of the will, the trustees are directed to pay, out of the rents and revenues, the taxes, repairs and insurance on this property.

In item 15 there are directions in regard to rebuilding in case of destruction by fire.

In item 18, there is a direction for the substitution of an Incorporated Trust Company in the District of Columbia in case the trustees fail, refuse or become unable to act.

In item 19, a reference is made to the rents and revenues derived from all the real estate in Washington, D. C.

In item 20, there are directions to the trustees to keep the houses insured and in repair, to pay the taxes thereon, and to rebuild them in case of destruction by fire.

In item 21, there is a general provision covering the rents and revenues from this property and a disposition of the property itself as follows: "On the first day of January, 1928, the title and ownership of the Washington, D. C., property, not hereinbefore disposed of, shall be and is hereby vested," as therein directed.

In item 22, there is a provision directing compensation to the trustees.

Nowhere in the succeeding items of the will is there found any provision modifying the disposition of the property found in item 5. On the contrary throughout the entire will there are found provisions carrying out the scheme therein plainly laid down, that the trustees were to have the control and management of this property until January 1, 1928. These statements refer, of course, simply to the general scheme of the will and not to the particular devise to Miss G. K. Jordan, the Appellee herein. Is this property rendered inalienable beyond the life or lives in being and twenty-one years? Is there any contingency which *must* happen within a life or lives in being and twenty-one years? Is there any contingency which *must* happen within twenty-one years at all events? In the words of item 5 of the will, "said trust to be continued in them (trustees) and their successors until the first day of January, 1928." The testator died on July 4, 1896. (Rec. 22.) Were a trust of

this kind valid the property would be in the hands of the trustees from July 4, 1896, to January 1, 1928, a period of thirty-one years and some months, and would be inalienable during that time. This trust violates the rule of law and is void.

The invalidity of this trust is not affected by the clause in item 21 of the will which provides "they (the devisees) shall receive the net rents arising from the respective houses and lots hereinafter devised to them respectively" upon the happening of certain events. Were this simply a passive trust from and after the happening of the event therein named, it might be contended that the rule against perpetuities did not apply. This contention would be based on the ground that the estates would coalesce. The word "net" takes the case out of the domain of passive trusts and makes it clearly an *active* trust. The word "*net*" means "obtained after deducting all expenses." Standard Dictionary; Bonner's Law Dictionary (Rawle's Revision); *St. John vs. Erie Railway Co.*, 22 Wall, 137, 148. The trustees then are to pay over the rents after deducting all expenses. What expenses? Why the expenses mentioned by the testator as chargeable against the rents of these houses, such as repairs, taxes, insurance. These expenses are naturally and ordinarily deducted from rents. And this construction fits in with the intention plainly manifested in items 5 and 7 of the will. The trustees are there empowered to pay these expenses during the entire period of their trust, or until January 1, 1928.

> "The income only was to be paid to his son 'after deducting taxes and necessary expenses.' The legal title was in the trustee, and therefore the legal and equitable title cou'd not coalesce under the rule in Shelley's Case." And the trust was upheld as an active trust.
> *Stambaugh's Estate*, 135 Pa. St. 597.

"We repeat, the mere fact that the *cestui que trust* has the entire beneficial interest in the trust estate is no test in determining whether the beneficial interest is a trust or a use. To hold so would be to abolish all distinctions between a trust and an use. Where the conveyance imposes on the trustee active duties with respect to the trust estate, such as to sell and convert it into money, or to lease the same and to collect the rents, issues and profits thereof, and pay them over to the beneficiary, it creates a trust which the statute does not execute."

Meacham vs. Steel, 93 Ill. 145.

See

Perry on Trusts, Sec. 305.
Girard Life Ins. Co. vs. Chambers, 46 Pa. St. 486.
26 American and English Ency. Law, p. 143.
Slater vs. Rudderforth, 25 App. D. C. 497.
MacCarthy vs. Tichenor, 29 Wash. L. R. 442.

APPELLEE'S INTEREST.

The general trust provisions of the will of Thomas Kearney are void. In what way, if any, can the interest of the Appellee in 611 M Street, N. W., Washington, D. C., be distinguished from the void possessions. The will makes specific mention of this piece of property. (Rec. 8 et seq.)

In items 3 and 5 of the will it is named as one of those pieces of property devised to the "trustees and their successors to have full, free and absolute possession and control of the same" until January 1, 1928. This piece of property is not separated in these items from the other pieces named and is subject to the same provisions that control the others therein.

In item 6, there are provisions for the payment of the rent of 611 M Street, to Appellee each month, and in case the rental falls below the sum of forty dollars, the trustees are to make up the difference, but in case the rental was over forty dollars, she should have all of it.

In item 7, the income from 611 M Street is excluded from the payment of taxes, repairs and insurance on the property.

In item 8, it is provided that upon the death of Appellee the fee simple title in 611 M Street, should be vested in Thomas K. Vertner, the testator's grandson. *Provided*, that if the Appellee should die before January 1, 1928, Thomas K. Vertner should receive from the trustees only the net rents and revenues. *Provided further*, that if Appellee die before Thomas K. Vertner shall have attained the age of twenty-two years, then, from the date of Appellee's death until Thomas K. Vertner shall have arrived at the age of twenty-two, the rents were to be disposed of by the trustees as was provided in the case of the other pieces of property.

In item 15, the duties of the trustees are restricted to the property in Washington, D. C., and in Virginia.

In item 17, there are directions in regard to rebuilding all the property in the case of fire and 611 M Street is not separately mentioned.

In item 18, there is the provision for the substitution of trustees, covering all the property.

In item 20, there are directions to the trustees to pay the taxes, insurance, repairs, and to rebuild in case of fire, and 611 M Street is not separately mentioned.

In item 21, mention is made of the rental from 611 M Street, in that it was not to go into the common fund with the rents derived from the other pieces of property. Then in the clause designating the particular pieces of property which were to go to the different grandchildren, it is noteworthy that 611 M Street is not mentioned.

Particularly as to Items 3 and 5.

These items are conflicting and involved. From them is to be obtained the intent of the testator, if such can be

done. There can be no question but that by the provisions of items 3 and 5 (Rec. 8.) an estate was attempted to be devised to the trustees *to take effect from the date of the testator's death and continue until January 1, 1928.* In item 3 of the will the testator recites that he owns certain pieces of property in Washington, D. C., and specifically mentions lot 611 M Street, N. W., in the city of Washington. In item 55 he devises to trustees all the real property mentioned in item 3 of the will and he specifically gives to the trustees the "full, free and absolute possession and control of the same" until January 1, 1928. In what way could a testator more emphatically and plainly state that he was creating a trust estate.

Moreover note that *no distinction* is made in these two items *between this property,* 611 M Street, and the other property *conveyed to trustees.* So far as the provisions of these items are concerned they stand on the same footing. The powers and duties granted to the trustees cover this lot as fully as the remaining pieces. The possession and control of the trustees over this piece of property is as full and complete under these items as is the possession and control of the trustees over any and all the other pieces mentioned. No distinction is made in these two items in regard to the time during which the trustees are to hold the property, they are to have all of the property until January 1, 1928.

Now item 5 is the only item in the will of Thomas Kearney which specifically conveys any right, title or interest in this Washington property to the trustees. In no other clause in the will is a property right of any kind in the property conveyed in words to the trustees. These trustees owe their existence to item 5 of the will. They derive their authority and control over the Washington property from item 5. It is true that in some cases equity will not allow a trust estate to fail for want of a trustee, but here are

named certain specific trustees in whose integrity and business capacity the testator has full faith. The entire property in Washington is given to them, and it is these trustees and these trustees alone to whom we look in this matter. It would not be equity to wrench the estate, or a portion of the estate, from these trustees so as to avoid the rule of perpetuity. The trust conveyed to them must stand or fall according to the will of the testator as expressd in the document now before the Court.

GENERALLY.

The Supreme Court and Court of Appeals of the District of Columbia upheld this devise of 611 M Street to the Appellee, Gabriella K. Jordan, principally upon the grounds that items 6 and 8 (Rec. 8.) of the will created a trust separate and independent from the other trusts in the will. In item 6 all the rents and revenues derived from 611 M Street are to be paid to her by the trustees during her life. Item 6 provides that the remainder in fee-simple of this property goes to the grandson of the testator upon the happening of certain events, until such events happen the trustees to receive and disburse the rents and revenues. There can be no contention but that these two items look to the vesting of 611 M Street in trustees. The learned Court of Appeals, in its opinion rendered in this case states, "If it shall become necessary, the Court may, under its general equity jurisdiction, appoint another trustee, for the purpose of giving effect to the execution of the trust." (Rec. 57.) But we are not here dealing with a single devise of property where no trustee is named; we are endeavoring to get at the intent of the testator. Can it be that the intent of the testator looked to the vesting of a estate in trustees for the life of Appellee, at all events? Dr. L. M. Taylor and E. S. Drake

are named trustees by the testator in item 5 of the will because he has full faith in their integrity and business capacity. In item 6 the direction is to *"my said trustees"* to pay the rental during the life of Appellee, and "my said trustees" are further authorized to increase the amount paid Appellee to forty dollars a month, should the rental of 611 M Street fall below that figure. In item 8 the entire first clause of the paragraph follows and depends upon the first line "*my said trustees* are authorized and instructed." The intent of the testator was to convey this property to the trustee named and to none others. These trustees were named and the validity of the trust must be determined by the estate conveyed to them.

Can this devise of 611 M Street to the trustees to the use of Appellee *be separated* from the devise to the trustees of the remaining property. This property was named in item 3 and was conveyed to the trustees together with the other pieces of property therein set out; no distinction was made in regard to the authority and control of the trustees; and in no other place is 611 M street or the other pieces of property conveyed to the trustees but in item 5. The term until January 1, 1928, runs throughout the entire scheme of the testator's devise of the Washington property. In item 5 it is given as the limit to the trustees' powers, it is mentioned in item 7, it is referred to under the proviso in item 8, it is given again as the limit of the trustees' powers in item 19; and in item 21 comes the clause giving the date upon which the property therein named shall vest, January 1, 1928.

The testator looked upon the estate conveyed to Appellee in items 6 and 8 as subject to the same restrictions as that imposed upon the other portions of the estate. It is specifically excepted from the provisions of item 7. By the provisions of item 8 the rents and revenues of the property are excepted from the action of all but the second proviso. No

exception of this property is made from item 18. It is excluded in item 21. Why should the testator have particularly excluded the devise to Appellee from these items if he had not considered that they were included in those items.

While it is true that the devise of an equitable life estate will not be avoided by an unlawful attempt to postpone the enjoyment, as held by the learned Court of Appeals (Rec. 56), these devises may be considered in determining the true intent of the testator as shown by the whole will.

In the last section of item 8 is an example of a clause to the trustees which runs even beyond the attempted life estate to Appellee.

The learned Justice in the Supreme Court of the District of Columbia held that the annuity in favor of Gabriella K. Jordan stands as an incumbrance or rent-charge primarily against lot 611 M street, and secondarily against his entire state for any balance of forty dollars per month that the rents of this lot might not yield (Rec. 41). Upon what basis can it be said that the intention of the testator was to have this allowance to his niece take precedence over all the other provisions of the will and become a primary charge against his estate? Note particularly that the argument used is for the purpose of learning the *intent* of the testator. In this case there is an elaborately drawn will covering almost fourteen pages of the printed record, containing twenty-two numbered items and which disposes of property of great value. Moreover, the reason and purpose of all this writing, was the testator's tender solicitation for his children and grandchildren, and his determination to preserve the bulk of his property intact for them until the date mentioned, January 1, 1928. The gift to Miss Jordan, at most was only a life estate in one small piece of property, with even the remainder over to one of his grandsons. Can it be that it was the primary intent of the testator to look

after this one small devise and make it an encumbrance on his entire property, with precedence over all others.

The word "remember" sometimes used in connection with legacies is very expressive and peculiarly applicable here. It may appropriately be applied to the devise to Miss Jordan. The testator, while preparing carefully his will for the benefit of his children and grandchildren, wished to "remember" his niece. Why is there so much difficulty in holding void this life estate of Miss Jordan, when the entire framework of the will, so far as concerns the trust over the Washington real property, has been destroyed.

INTEREST OF LILLIE K. VERTNER.

In item 7 of the will (Rec. 11) there is a provision which looks to the vesting of the title to a certain vacant lot on Twentieth street, Washington, D. C., in the granddaughter of the testator. This clause of the will, and it is the only clause dealing with this lot, attempts to vest the fee-simple title in this grandchild upon her reaching the age of nineteen years, provided the testator did not improve the said lot during his lifetime. In case the testator made improvements upon this lot during his lifetime, the fee-simple title did not vest in Lillie K. Vertner until January 1, 1928, but she would receive only the net rents until that date.

The learned Justice in delivering his opinion in the Supreme Court of the District of Columbia held that this devise of the vacant lot on Twentieth street was a valid disposition of the property (Rec., 41). However, while it may be true that an unlawful attempt to postpone the enjoyment of an interest in remainder does not affect the particular estate, the facts of the present case go rather to the breaking down of the particular estate itself. This vacant lot on Twentieth street was particularly named in item 3 of the will. It was conveyed by item 5 to the

trustees therein named, the "said trustees and their successors to have full, free and absolute possession and control of the same" until January 1, 1928 (Rec., 9). And this item 5 is the only portion of the will wherein the testator devises this vacant lot on Twentieth street to the trustees. No distinction is made in these items 3 and 5 between this vacant lot on Twentieth street and the other pieces of property therein named. The powers and duties of the trustees under this will have reference to the date January 1, 1928. This property is devised to these particular trustees, and to no others, and it would not subserve the purpose of the testator to take the estate away from the men "in the integrity and business capacity" of whom the testator had such full faith (Rec., 9). The learned Court of Appeals suggested that this might be done in the case of the property devised to Gabriella K. Jordan, the appellee herein, but the entire framework of the will is based upon the control of the trustees over the property until January 1, 1928.

Wherefore, it is respectfully submitted that the decree of the Court of Appeals and the Supreme Court of the District of Columbia should be reversed and the bill of review dismissed.

FRANK SPRIGG PERRY,
Counsel for Petitioner.

OCT 9 1906
JAMES H. MCKENNEY, Clerk

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1906.
No. 179.

C. S. LANDRAM AND J. A. BROADDUS, Executors, et al.,
Appellants,

vs.

GABRIELLA K. JORDAN,
Appellee.

Appeal from the Court of Appeals, District of Columbia,
No. 1476.

NOTICE OF PETITION FOR LEAVE TO FILE A BRIEF IN BEHALF OF MARY B. KEARNEY.

Take notice that the annexed petition for leave to file a brief and be heard in the above entitled cause on behalf of Mary B. Kearney, petitioner, will be presented to the Supreme Court of the United States on Tuesday, October 8, 1906, at the coming in of the Court or so soon thereafter as counsel can be heard.

October 3, 1906.

FRANK SPRIGG PERRY.
Bond Building, Washington, D. C.
Counsel for Petitioner.

To

JOHN J. HEMPHILL, ESQ.,
Washington, D. C.

THOMAS P. WOODWARD, ESQ.,
Washington, D. C.

W. MOSBY WILLIAMS, ESQ.,
Washington, D. C.
Counsel for Appellants.

CHARLES F. WILSON, ESQ.,
Washington, D. C.

FRANK W. HACKETT, ESQ.,
Washington, D. C.
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

C. S. LANDRAM AND J. A. BROADDUS, Executors, et al.,
Appellants,

vs.

GABRIELLA K. JORDAN,
Appellee.

Appeal from the Court of Appeals, District of Columbia,

No. 1476.

PETITION FOR LEAVE TO FILE A BRIEF ON BEHALF OF MARY B. KEARNEY.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner Mary B. Kearney, respectfully asks leave to file a brief and be heard in the above entitled cause and, as grounds for this request, respectfully shows to the Court as follows:

That your petitioner is the widow of Edmund Kearney, who departed this life on or about June 4, 1898, and that there are no children or descendants of children now surviving. That the sole heir-at-law of the said Edmund Kearney was his sister, Mrs. Constance K. Vertner, since deceased. Edmund Kearney left by will of date of June 2, 1898, all his property real and personal to your petitioner, with the exception of a bequest of five hundred dollars, but this will was not in proper form to pass title to real estate under the laws of the District of Columbia, so that he died intestate as to all real property situate therein. Thomas Kearney, the father of said Edmund Kearney, who departed this life on or about July 4, 1896, owned real property of considerable value in the District of Columbia

and attempted to dispose of it by a will dated June 4, 1896. By a decree of the Supreme Court of the District of Columbia filed June 27, 1900, this will of Thomas Kearney was held to be in violation of the rule against perpetuities so far as concerned the real estate situate within the District of Columbia and that he died intestate as to all real property situate therein. The real estate of Thomas Kearney in the District of Columbia descended to his two children, Constance K. Vertner, since deceased, and Edmund Kearney, the husband of your petitioner. That Constance K. Vertner died on or about June 6, 1904, and disposed of all the property received from Thomas and Edmund Kearney by will. The three children of Constance K. Vertner, who are her heirs-at-law and devisees under her will, have been made parties to this suit together with the Executors of Constance K. Vertner and are all represented in this Court by counsel. Your petitioner is interested in this case to the extent of her dower rights of a third in the real estate left by her husband, Edmund Kearney.

That a bill to review the decree of the Supreme Court of the District of Columbia of June 27, 1900, was filed by Gabriella K. Jordan, one of the devisees under the will of Thomas Kearney, and the Supreme Court of the District of Columbia under date of July 8, 1904, modified its former decree and held valid this devise of real estate in the District of Columbia to Gabriella K. Jordan. This decree of July 8, 1904, was sustained by the Court of Appeals, District of Columbia, on April 4, 1905. *Landram vs. Jordan*, 25 App. D. C. 293. The appellants therein are now prosecuting their appeal to this Honorable Court.

That your petitioner was not made a party to any of the proceedings in this cause. That while the heirs herein have recognized the claim of your petitioner to a third interest in the real estate of her deceased husband, Edmund Kearney, in the District of Columbia and paid her for a long

time a proportionate part of the rental, no dower has been formally assigned your petitioner. That this decree of the Supreme Court of the District of Columbia of July 8, 1904, modified the prior decree of the same Court and held valid a certain devise of land in the District of Columbia to Gabriella K. Jordan, and will materially injure your petitioner in that the dower interest of your petitioner in this real estate will be reduced proportionately. The statement of errors in the Court of Appeals, District of Columbia, was as follows:

> The suit of Gabriella K. Jordan *vs.* Elijah S. Drake, trustee, and others, in the Supreme Court of the District of Columbia, from the final decree in said suit, in which this appeal has been taken, was instituted for the purpose of reviewing and modifying the decree entered on the 27th day of June, 1900, in the cause of Elijah S. Drake, trustee, *vs.* Leroy M. Taylor, trustee, and others, construing the last will and testament of Thomas Kearney, deceased, so far as the same devised or attempted to dispose of lands situated in the District of Columbia, and that the Appellee be permitted to remain in the enjoyment of the rents and revenues derived from the real estate in the District of Columbia as provided in the sixth item of the said will, and that the Court below erred in overruling the demurrers of the appellants and in entering a final decree on the 8th day of July, 1904, and in not sustaining appellants' demurrers and dismissing the bill of review of Appellee.

The right of your petitioner to dower is necessarily involved in the determination of the construction of the will of Thomas Kearney and will be materially affected by a decree in this cause.

That the interests of your petitioner are involved in this case is recognized by the decrees of the Supreme Court of the District of Columbia of July 8, 1904, and of the Court of Appeals, District of Columbia, of April 4, 1905, in both

of which it is held that the interests of your petitioner are not concluded by the decrees therein rendered. *Landram vs. Jordan*, 25 App. D. C. 301. But while your petitioner will not be technically bound, her rights will be in effect determined, as the principal grounds for any rights she has in dower depend upon the invalidity of the will of Thomas Kearney and of each of its provisions relating to the real estate situate within the District of Columbia, and will be considered and decided by the decree in this cause. *California vs. Southern Pacific Co.*, 157 U. S. 229.

The right of your petitioner to dower before assignment is one which the law will protect and your petitioner is entitled to stand with the heirs in a suit involving the property. *Shepherd vs. Manhattan Railway Co.*, 117 N. Y. 446, affirming same case in 57 N. Y. Super. Ct. 5; *Sykes vs. Chadwick*, 18 Wall. 145; *Rogers vs. Potter*, 32 N. J. L. 78.

Wherefore, trusting in the exercise of that well known liberality of this Honorable Court in permitting interested parties to be heard (*Northern Securities Co. vs. U. S.*, 191 U. S. 555), your petitioner prays that she may be allowed to file a brief herein or be heard in such manner and upon such terms as this Honorable Court may see fit to direct.

Respectfully submitted.

MARY B. KEARNEY.

F. SPRIGG PERRY,
Counsel for Petitioner.

STATE OF MISSISSIPPI,
County of Adams.

I do solemnly swear that I have read the foregoing petition by me subscribed, and know the contents thereof, and the facts therein stated upon my personal knowledge

are true, and those stated upon information and belief I believe to be true.

MARY B. KEARNEY.

Subscribed and sworn to by me this 22nd day of May, 1906.

RICHARD F. REED,
Notary Public.

(NOTARIAL SEAL)

AUTHORITIES IN SUPPORT OF PETITION.

In the case of the *Northern Securities Co., vs. U. S.*, 191 U. S. 555, this Court has stated that great liberality is permitted in the matter of allowing interested parties to be heard. In the petition in the present case it is shown that the party making the present application to be heard is materially interested in the decision herein. Her rights will in effect be determined by a decision in the case, even though the court in its decree excepts her interests.

Green vs. Biddle, 8 Wheat. 1, 17.
The Gray Jacket, 5 Wall. 370

Your petitioner was not made a party to the bill of review in either the Supreme Court or the Court of Appeals, District of Columbia. That she was a necessary party to the bill is apparent from the authorities cited in the brief herewith attached. Petitioner desires to be heard but she does not wish to waive her right to object to this bill for want of parties. As petitioner is neither plaintiff nor defendant in the present suit she is not entitled to a judgment in her favor or liable to a judgment against her.

Florida vs. Georgia, 17 How. 478, 495.

Supreme Court of the United States.

No. 179.—October Term, 1906.

Charles S. Landram and John A. Broaddus, Executors of Constance K. Vertner, deceased, and Lillie K. Vertner, Appellants, *vs.* Gabriella K. Jordan. | Appeal from the Court of Appeals of the District of Columbia.

[October 22, 1906.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an appeal from a decree of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court upon a bill of review brought by Gabriella K. Jordan, the appellee. The decree under review was rendered in a suit for the construction of the will of Thomas Kearney and for the determination of the validity of a trust created by it, so far as the same concerned land in the District of Columbia. That decree declared the trust bad as attempting to create a perpetuity. Under the bill of review the decree was modified, on demurrer, to the extent of the interest of Gabriella K. Jordan, and the trust was declared valid as to her. App. D. C. . The executors of the testator's heir and a daughter of the said heir appealed to this Court.

Thomas Kearney died on July 5, 1896. The will disposes of land in various places. In item 3 it enumerates the testator's property in Washington. In item 5 it devises this and other property upon a trust to be continued until January 1, 1928, and there and elsewhere, with the following exception, makes a fund from the Washington rents and profits to be disposed of as directed in the will. Item 6 is as follows:

"I hereby authorize and direct that my said trustees shall during the natural life of my beloved niece, Gabriella K. Jordan, pay over to her regularly each month, as soon as collected, all rents and revenues collected or derived from that certain property described in the third item hereof as lot No. 611 'M' Street, N. W., Washington, D. C.; but, in case said rents and revenues shall at any time be less than the sum of forty dollars for any one or more months, then my said trustees are hereby authorized and instructed to add to the sum so collected a sufficient amount to make the said amount of forty dollars for each and every month; it being my desire that she shall have a regular income of at least forty dollars per month, and that the same shall be paid over to her monthly; but if the income derived

from said premises shall amount to a sum in excess of forty dollars per month, she shall have the whole thereof." (Rec., 10.)

Item 7 directs the trustee to let all the Washington property, except 611 M street, and out of the rents to pay ninety dollars a month to the testator's daughter, Constance K. Vertner, as ordered in item 5; the residue, so far as necessary, to be applied to the support and education of her three children, named, with further provisions. Item 8 gives the remainder in fee of 611 M street to the testator's grandson, provided that if Gabriella Jordan dies before January 1, 1928, he shall only receive the rents and profits, and if she dies before the grandson reaches the age of twenty-two the rents shall be disposed of as provided in item 7 as to other Washington property. In item 21, the testator, "for fear that there may be some difficulty in construing the different provisions" of the will, states his intention that all the money arising from the Washington rents, "except that which is to go to Gabriella K. Jordan, shall be placed in a common fund for the payment (1) of taxes, insurance and repairs on said property and of the premises at Luray, Virginia; (2) of (90) ninety dollars per month to my said daughter, Constance K. Vertner during her natural life; (3) for the support, education and maintenance of my said three Vertner grandchildren until Lillie K. Vertner shall have arrived at the age of nineteen years, and until Edmund K. and Thomas K. shall have arrived at the age of twenty-two years respectively."

The persons in whose favor were made the provisions which were adjudged bad were one of the testator's heirs, his daughter, Constance K. Vertner, and the children of Constance. The daughter pleaded that the other heir, Edmund Kearney, also provided for in the will, died, leaving her his heir, that the trust was bad, and, by implication, that she was entitled to the property which it embraced. She now is dead. By the original decree the whole trust fund, including that given to Gabriella Jordan, went to the testator's heirs as property undisposed of by the will. The only person dissatisfied with that decree was Gabriella Jordan, and on the other hand the executor and children of Constance are the only appellants from the decree on review. According to the rule that has been laid down in this Court, Gabriella, as she did not appeal, cannot go beyond supporting the decree and opposing every assignment of error. *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 527. *The Stephen Morgan*, 94 U. S. 599. *Chittenden* v. *Brewster*, 2 Wall. 191, 196. *Field* v. *Barber Asphalt Paving Co.*, 194 U. S. 618, 621. We assume this rule to be correct. Although her counsel attempted to argue the validity of the trust as a whole, and other questions, we assume, without deciding, the decree to be unimpeachable and right except so far as appealed from. Therefore we shall confine ourselves to considering whether the gift to Gabriella is so intimately connected with the failing scheme as to fail with it.

It would be a strong thing to say that we gather from this will an intent that, if the trust so far as it concerns the testator's descendants should fail because they prefer to take the property by intestacy free from the limitations of the will, therefore the one gift outside his family should be defeated also. The trust is not a metaphysical entity or a Prince Rupert's drop which flies to pieces if broken in any part. It is a provision to benefit descendants and a niece. There is no general principle by which the benefits must stand or fall together. It is true that all the Washington property was given to the trustees in one clause and that a part of the scheme in favor of the testator's grandchildren was the creation of a fund from the rents. But, as is stated in item 21, 611 M street was excepted from the scheme, and the whole income of this lot, or in other words an equitable estate in the specified land, is given to Gabriella Jordan for life by item 6. If that were all we see no reason for a doubt that that gift would be good, whether the gift to the other beneficiaries were good or not. The fact that the testator's daughter takes all the rest of the property instead of her children getting a postponed interest in a part, is no ground for denying to the niece the life estate given to her in an identified and excepted piece of land. It does not make the case any worse that a part of the property thus going to the testator's daughter is the remainder in the estate given to his niece.

The appellants lay hold of the instructions to the trustees to add to the rents enough to make Gabriella's income up to forty dollars a month, and argue as if the gift were in substance only a gift of forty dollars a month from a fund that cannot be established. Such is not the fact. The gift is primarily and in any event a gift of the income of 611 M street. But whatever may be the fate of the rest of the trust we see nothing to hinder the trustees from keeping the income up to forty dollars from the other property devised to them. Of course they could not derive income from property not included in the trust, and only the property included is charged with the liability. The decree may be modified by inserting after the words "against his entire estate" the words "in the District of Columbia."

It is objected in argument, although not in the pleadings, that the widow of Edmund Kearney has a right of dower in the Washington estate which descended to him, and that she should have been made party to the bill of review. The fact of the widow's existence does not appear of record as against the appellees, and we agree with the Court of Appeals that the objection is made too late.

Decree affirmed.